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In the Supreme Court of the United States

OCTOBER TERM, 1935

ATLANTA, BIRMINGHAM AND COAST RAILROAD COMPANY,
Appellant,

VERSUS

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 9

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF ON BEHALF OF ATLANTA, BIRMINGHAM AND COAST RAILROAD COMPANY

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October 14, 1935. Atlanta, Georgia.

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BRIEF ON BEHALF OF ATLANTA, BIRMINGHAM AND COAST RAILROAD COMPANY

I.

REFERENCES TO OFFICIAL REPORTS AND OPINIONS DIRECTLY CONCERNING THIS CAUSE

1. Docket No. 12964. Consolidation of Railroads. Decided August 3, 1921—63 I. C. C. 455—460543.
2. Valuation Docket No. 1. Atlanta, Birmingham & Atlantic Rd. Co., Georgia Terminal Company and Atlanta Terminal Railroad Company, decided July 20, 1923—75 I. C. C. 645.
3. Finance Docket No. 5454 (including No. 5470 also), Reorganization and Control of Atlanta, Birmingham and Atlantic Railway Co., decided October 26, 1926, 117 I. C. C. 181.
4. Finance Docket No. 5454. Reorganization and Control of Atlanta, Birmingham and Atlantic Railway Co., decided December 21, 1926, 117 I. C. C. 439.
5. Finance Docket No. 5454. Reorganization and Control of Atlanta, Birmingham and Atlantic Railway Co., decided April 11, 1928. (Not reported.)
6. Atlanta, Birmingham and Coast Railroad Company v. United States, et al, United States District Court for the Northern District of Georgia, decided October 26, 1928—28 Fed. (2d) 885.
7. Finance Docket No. 5454. Reorganization and Control of Atlanta, Birmingham and Atlantic Railway Company, decided October 9, 1929, 158 I. C. C. 6.

8. Atlanta, Birmingham and Coast Railroad Company v. United States, et al, United States District Court for the Northern District of Georgia, decided January 18, 1930, 37 Fed. (2d) 401.

9. United States, et al, v. Atlanta, Birmingham and Coast Railroad Company, decided February 24, 1931, 282 U. S. 522.

10. Docket No. 25170. Accounting for Capital Items (In re: Atlantic Coast Line Railroad Company and Atlanta, Birmingham and Coast Railroad Company), decided July 9, 1934, 201 I. C. C. 645.

11. Atlanta, Birmingham and Coast Railroad Company v. United States, et al, United States District Court for the Northern District of Georgia, decided December 14, 1934. (Not reported, but see Record 339.)

II.

STATEMENT AS TO JURISDICTION

Upon the presentation of the petition for allowance of appeal in this cause appellant filed a typewritten statement, particularly disclosing the basis upon which it was contended that this Court has jurisdiction to review the decree in question. Said statement was in conformity with the requirements of paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. This statement was duly served upon all opposing counsel, and on April 8, 1935, this Court noted probable jurisdiction in this case.

III.

STATEMENT OF THE CASE

The ultimate question involved in this case is:

> "Did the Interstate Commerce Commission correctly and lawfully order that the Atlanta, Birmingham and Coast Railroad Company should, in opening its books of account, show account No. 701, 'Investment in Road and Equipment,' at $6,729,896.03?"

This is an appeal from a final decree of the United States District Court for the Northern District of Georgia (presided over by Mr. Circuit Judge Sibley, Mr. District Judge Grubb and Mr. District Judge Underwood) entered on the 14th day of December, 1934 (R. 339; not yet reported).

This decree was rendered upon a bill filed by Atlanta, Birmingham and Coast Railroad Company against United

States of America, et al, on August 30, 1934 (R. 1, et seq.). The purpose of the bill was to enjoin an order of the Interstate Commerce Commission entered on July 9, 1934, in its docket No. 25170 (R. 27-61). A copy of said order of the Commission then entered it as follows:

> "A hearing and investigation of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing the findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;
>
> "It is ordered, That the Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to eliminate from account 751 'Capital stock,' all liability on account of non-par common stock in excess of $4,248,413.76.
>
> "It is further ordered, That the Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to state the balance in account 701, 'Investment in road and equipment,' in accordance with the classification of investment in road and equipment as provided under account 41 'Cost of road purchased,' and in conformity with the preceding paragraph hereof.
>
> "And it is further ordered, That this order shall take effect and be in force from and after 30 days from the date of service hereof.
>
> "By the Commission. George B. McGinty, Secretary (Seal)." (R. 61).

The District Court denied the injunction prayed for. (R. 339-341).

Analysis of the Above Order of the Interstate Commerce Commission.

The aforementioned order of the Commission is not clear unless there is taken into consideration previous statements of the Commission.

The Commission in its report "Reorganization and Control of Atlanta, Birmingham & Atlantic Railway Company," 117 I. C. C. 439 at pages 442-43 ordered:

> "That the Atlanta, Birmingham & Coast Railroad Company be, and it is hereby, authorized to issue not exceeding $5,180,344.07 of its preferred capital stock and not exceeding 150,000 shares of its common capital stock without nominal or par value; said preferred and common stock to be used for the purposes specified in the application recorded under Finance Docket No. 5454 and in the report aforesaid:
>
> "*Provided, however,* and authority to issue said stock is granted upon the express condition that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of Account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor."

In order to find what was the amount received for the common stock the Commission finds in its last report (July 9, 1934; 201 I. C. C. 645) at 671:

> "We find that the market or fair cash value of the properties in question did not exceed the sum of $9,428,713.76, as of January 1, 1927." (R. 60).

The figure $9,428,713.76 is the sum of the par value of the preferred stock (said preferred stock was reduced from $5,180,344.07 to $5,180,300), plus the amount which the Commission found had been expended by the Atlantic Coast Line Railroad Company in the payment of the items specified in Exhibit A to the agreement of February 23, 1926 (R. 83). Those items are there stated to aggregate $3,677,500, but the Commission found they were actually at the time of its report on July 9, 1934, $4,248,413.76.

When these figures are analyzed as they are at record page 213, they require that account 701—"Investment in road and equipment"—be set up at $6,729,896.03 and the other assets of the Company be set up at $2,698,817.73. That balances the figures used in setting up the capital stock account—751—wherein the preferred stock is set up at $5,180,300 and the common stock at $4,248,413.76.

History of the Property Involved—Receivership of Property of Atlanta, Birmingham & Atlantic Railway Co.

The property which is involved in this case is that which had been previously owned by the Atlanta, Birmingham and Atlantic Railroad Company, Georgia Terminal Company and Atlanta Terminal Railroad Company and which was valued by the Interstate Commerce Commission, reported in Valuation Docket No. 1, 75 I. C. C. 645. The valuation was made on July 20, 1923, as of June 30, 1914. That property was subsequently acquired by the Atlanta, Birmingham and Atlantic Railway Company. (R. 30).

On the 25th day of February, 1921, the property of Atlanta, Birmingham and Atlantic Railway Company was placed in the hands of a Receiver in the United States District Court for the Northern District of Georgia. This was done at the suit of creditors.

AGREEMENT OF FEBRUARY 23, 1926.

On February 23, 1926 (R. 73), there was executed by representatives of bondholders of Atlanta, Birmingham and Atlantic Railway Company of the one part and Atlantic Coast Line Railroad Company of the other part, an agreement looking to the sale, purchase and reorganization of this property.

Under that agreement the bondholders of Atlanta, Birmingham and Atlantic Railway Company, through the committees, were to bid for the property at the contemplated foreclosure sale and were to endeavor to cause said properties to be acquired by the New Company (Atlanta, Birmingham and Coast Railroad Company). The committees were to bid for the property at such sale or sales an amount up to but not exceeding $4,500,000 in addition to the indebtedness of the Old Company prior to the mortgages securing the bonds, equipment obligations and obligations of the receiver substantially as set forth in Exhibit A to the agreement. Exhibit A is set out at page 83 of the record and the amount there stated was $3,677,500. That amount grew into $4,248,413.76 up to the date of the Commission's report in this case—July 9, 1934. The Atlantic Coast Line Railroad Company was to furnish the amounts required to enable the committees or their nominees to qualify as bidders at said sale or sales which the court might require in addition to the deposit of bonds held by the

committees. After confirmation of such sale or sales by the court and upon the acquisition of said properties by the New Company, subject only to such of the items included in Exhibit A hereinabove mentioned as may not have been already discharged, the Atlantic Coast Line Railroad Company was to reimburse the committees or their nominees for payments of such portion of the purchase price of said properties so sold as may have theretofore been required from time to time by the court to be paid in cash.

Each bondholder of the Old Company who had assented to the plan was to receive in exchange for his bond $60.00 par value of preferred stock of the New Company for each $100.00 principal amount of bonds held by him and deposited by him in accordance with the plan. The holders of the bonds who did not assent to the plan were to receive in cash their pro rata distributive share, as fixed by the court, of the proceeds of sale of said properties.

The Atlantic Coast Line was to furnish cash sufficient to meet the respective distributive shares in the proceeds of said sale or sales in respect to any of the bonds which did not assent to the plan, or to reimburse the committees for any amount which may have therefore been paid or provided for that purpose by them. All claims admittedly having, or adjudged to have, priority over any of the mortgages of the Old Company, loans of the Old Company for which bonds of the Old Company had been pledged, equipment obligations of the Old Company held by the United States Government (if it were necessary to pay off the same) and obligations of the Receiver were to be paid in cash by the Coast Line Company upon acquisition of said properties by the New Company, ex-

cept that the obligations of the Old Company and of the Receiver not matured at the time of the acquisition of the properties by the New Company might be assumed by the New Company instead of being paid in cash, but Atlantic Coast Line Railroad Company was required to provide or cause the New Company to provide the necessary cash to pay such obligations as they matured. The obligations referred to were those set out in Exhibit A to the agreement to which reference has been heretofore made.

The Atlantic Coast Line Railroad Company also guaranteed five per cent. per annum dividends on the preferred stock of the New Company of which $5,180,300 was issued and guaranteed the retirement thereof which was not less than par value in any circumstances and in others $103 per share plus accrued dividends.

The property was sold at the foreclosure sale on June 22, 1926. It was purchased by George E. Roosevelt and J. A. Fowler, Jr., on behalf of the Reorganization Committee and on condition that the Interstate Commerce Commission would issue orders conferring authority substantially sufficient to enable the parties to carry out the plan and agreement of reorganization. The sale was reported to the Court and was confirmed upon the condition referred to.

The Reorganization Committees were to convey to the New Company the properties acquired at foreclosure subject only to such of the items included in said Exhibit A as might not, at the time of such conveyance, have been paid because not yet matured and the New Company was to pay for said properties by issuing to the Purchasing Committee for the Bondholders all of its stock, common and preferred. The

preferred stock, guaranteed as aforesaid, was to be delivered by the Committee to the bondholders in exchange for their bonds, and the entire 150,000 shares of voting common stock was to be sold by the purchasers to Atlantic Coast Line Railroad Company. (See opinion of Commission, F.R.* 313 and of Court, F.R. 220, 222). 117 I. C. C. 181-28 Fed. (2d) 885.

PLAN AND AGREEMENT OF REORGANIZATION.

The agreement of February 23, 1926, was made the basis of the Plan of Reorganization, herein sometimes called the Plan, which was adopted by the bondholders, and appears on page 84 of the record in this case. This plan was adopted for the purpose of making the agreement of February 23, 1926, effective (R. 84).

APPLICATIONS TO THE COMMISSION
FINANCE DOCKETS 5454 AND 5470.

Pursuant to the plan and agreement of reorganization, the bondholders' committee filed with the Interstate Commerce Commission its application on behalf of the company to be organized, "pursuant to said plan and agreement of reorganization dated February 23, 1926" (which plan was recited in the application), for the purpose of securing the approval by the Commission of the acquisition and operation by the New Company of the lines of railroad of the A. B. & A. Railway Company and for authority for the issuance by the New Company of preferred stock and common stock in accordance with the Plan (F.R. 111). In this application it was stated that:

*"F.R." indicates "First Record" before this Court in the case of *United States, et al, v. Atlanta, Birmingham and Coast Railroad Company*, 282 U. S. 522.

"Fifth. The purposes and uses of the proposed issue of capital stock are to acquire the lines of railroad and other properties of the Old Company and its Receiver, as aforesaid, and to carry out the plan." (F.R. 113).

Subsequent to the filing of the application on behalf of the New Company just above mentioned, Atlantic Coast Line Railroad Company, on April 12, 1926, filed with the Interstate Commerce Commission its application for authority in accordance with the plan to execute the guaranty of the preferred stock of the New Company and to acquire control of the New Company by the acquisition from the bondholders of the entire issue of common stock of the New Company. This application was given Finance Docket No. 5470 (R. 149).

Pursuant to the requirements of the Interstate Commerce Commission the bondholders filed the return to questionnaire, submitted to them. In that return the following statement appears, among others:

"The reorganization committee, or its nominee, will hold control over the applicant until the consummation of the plan, at which time control will be transferred to Atlantic Coast Line Railroad Company. Control will be in the form of the entire outstanding common stock." (F.R. 260).

FORECLOSURE SALE.

On June 22, 1926, the Special Master offered for sale the properties of the old A. B. & A. Railway Company. At that sale the properties were purchased by the purchasing committee of the bondholders of the old A. B. & A. (R. 6; F.R. 130). The bid of such purchasers was conditioned on the making by the Interstate Commerce Commission of orders con-

ferring authority substantially sufficient to enable the parties to carry out the plan and agreement of reorganization (R. 6-7; F.R. 139). The petition of the purchasers for confirmation of the sale, showing these facts, is set out on page 130 of the First Record and the Special Master's report of sale appears on page 135 of the First Record.

FIRST ORDER OF THE COMMISSION.

Under date of October 26, 1926, the Interstate Commerce Commission entered its first report and order (F.R. 311) 117 I. C. C. 181. By this report and order the Commission approved the agreement of February 23, 1926, and the plan of reorganization, authorized the acquisition by the Atlantic Coast Line of control of the New Company to be organized and stated:

> "There is no difficulty in reaching the conclusion that from the standpoint of transportation service the proposed reorganization and control by the Atlantic Coast Line is in the public interest. The sentiment in favor of the plan in the territory served by the A. B. & A. is apparently unanimous and earnest. Approval should therefore be given and the necessary authority issued, unless there be something in the terms and conditions of the proposed acquisition, or in the consideration, so inequitable as to require modification in the public interest. We find nothing of this character in the arrangement. It is true that there is wide disparity between the proposed price to be paid by the Atlantic Coast Line for its control of the property and the value of the property viewed as a basis for rate making, but our highest court has distinguished between value for rate making purposes and exchange value. *Galveston Electric Company v. Galveston*, 258 U. S. 388." (F.R. 316-17). 117 I. C. C. 187.

The Commission held:

> "The new company has not been incorporated. We are advised by counsel for the applicants that incorporation under the laws of the State of Georgia is considered desirable, but under those statutes no charter may be issued to purchasers taking over property under foreclosure sale until a master's deed has been executed. To meet this desire, action upon the application of the new company for authority to issue securities and upon the application of the Atlantic Coast Line for authority to assume obligation with respect to such securities will be deferred. Upon receipt of proof of incorporation of the new company, accompanied by a copy of its charter, we will dispose of the remaining applications by supplementary report and order." (F.R. 318, 117 I. C. C. 187).

ORGANIZATION OF ATLANTA, BIRMINGHAM AND COAST RAILROAD CO.

Pursuant to this authority by the Commission, the sale of the properties of the old A. B. & A. and its Receiver to the bondholders' committee was unconditionally approved by the order of the United States District Court entered November 16, 1926, and those properties of the old A. B. & A. were on that day conveyed to the bondholders' purchasing committee (R. 333-335). Thereupon, the said purchasers, George E. Roosevelt and J. A. Fowler, filed application with the Secretary of State of the State of Georgia, asking for a charter for the New company to be organized in accordance with the plan and to acquire the properties purchased by said committee at foreclosure (R. 3-9). The charter was issued by the Secretary of State on November 22, 1926 (F.R. 231). By this charter the new company was given authority, inter-alia,

"for the issue of all or any of said fifty-two thousand shares of preferred and/or said one hundred and fifty thousand shares of common stock for the purpose of acquiring and paying for the property and assets described in article first hereof and for the purpose of carrying out the above-mentioned plan and agreement of reorganization dated February 23, 1926." (F.R. 240).

Pursuant to this charter, the New Company was organized and was authorized to issue $5,180,344.07 par value of preferred stock and 150,000 shares, without par value, of common stock, and the officers of the New Company were authorized to cause to be done such acts or things as were necessary to carry out and observe the agreement of February 23, 1926, and the plan of reorganization (F.R. 245). The New Company then joined in and adopted the application then pending before the Commission (R. 110).

SECOND ORDER OF THE COMMISSION.

Without further hearing the Interstate Commerce Commission, after consideration of the foregoing, made its second report and order (117 I. C. C. 439) under date of December 21, 1926, and authorized the issuance by the New Company of $5,180,344.07 of preferred stock and the 150,000 shares of no par common stock and also authorized the guaranty by the Atlantic Coast Line Railroad Company of the dividends on the preferred stock and the retirement value thereof in accordance with the plan. The authority of the Commission to the New Company for the issuance of its stock was made subject to condition as follows:

"Provided, however, and authority to issue said stock is granted upon the express condition that, for the pur-

poses of the accounting, as provided in the classification of investment in road and equipment in the text of account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; *and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor.*" (Italics added). (R. 28; 117 I. C. C. 442).

Account 41, referred to in this condition, is shown on page 52 of the record. It provides:

> " . . . Where the consideration given for the property purchased is other than cash; such consideration shall be valued on a current cash basis," etc.

The construction of this condition, and its application to the facts herein was the actual and controlling issue in the original case.

CONSUMMATION OF THE PLAN.

Pursuant to the authority of the Commission given by the two orders of October 26th and December 21st, 1926, the sale was consummated to the New Company in consideration of its two classes of stock on January 4, 1927 (as of January 1, 1927) (R. 259).

SUBSEQUENT ACTION BY THE COMMISSION LEADING UP TO ITS THIRD ORDER.

The New Company employed Haskins & Sells, Certified Public Accountants, to assist it in preparing its balance sheet and opening its books. Haskins & Sells submitted a tentative balance sheet as of January 1, 1927 (R. 121 et seq.). The bal-

ance sheet so submitted was prepared after consideration of the condition in the order of the Commission of December 21, 1926, and was based on the value of the property received by appellant in exchange for its stock.

This balance sheet was submitted to the Commission and on August 3, 1927, the Commission through letter of Mr. Wylie, its Director of the Bureau of Accounts, directed appellant to reduce its entry in "Investment in Road and Equipment" (Account 701) by $22,390,985.21, or from $29,471,859.00 to $7,080,873.79 (R. 131, 39-40).

The reckoning of the preferred stock at par, or $5,180,-344.07, was not objected to. Mr. Wylie determined that the common stock must be set up at $4,080,699.80, the amount paid by the Coast Line for debts of the Old Company, or its Receiver. From this he deducted the $1,918,117.46 of accrued depreciation, leaving $2,162,582.34. He then deducted this amount from the $24,553,567.55 shown against the common stock, leaving $22,390,985.21, which is the amount by which he says the "Road and Equipment" total of $29,471,-859.00 must be reduced leaving $7,080,873.79 to represent the property acquired by appellant (R. 39-41), a *part* of which property had been valued as of June 30, 1914, by the Commission at $23,242,107.00 (F.R. 160-75 I. C. C. 645).

THIRD ORDER OF THE COMMISSION ENJOINED BY FIRST DECREE OF DISTRICT COURT [28 Fed. (2d) 885].

Appellant, upon receipt of this letter, filed with the Commission its supplemental application (R. 134) and the Statement of Facts (R. 134) showing that under the plan as ap-

proved and carried out, the New Company, appellant, did not and could not receive any part of the $4,080,699.80; that it received for its stock, common and preferred, the property of the Old Company, A. B. & A. Railway Company, that the condition in terms referred to the "amount received" by the appellant for the stock and that the requirement in the letter from Mr. Wylie, above referred to, was contrary to the facts and based on a misconstruction or total disregard of the terms of the provisio of the order of December 21, 1926. Appellant asked that the Commission overrule Mr. Wylie and permit it to show, on its books, as the amount received for its common stock, the value of the property of the Old Company, less the par of the $5,180,344.07 of preferred stock (F.R. 289). It was the property which was "received" for its said shares of stock.

Without a hearing the Commission by its order of April 9, 1928, denied the application (F.R. 10).

FIRST DECREE OF DISTRICT COURT
[28 Fed. (2d) 885, Oct. 26, 1928].

Thereupon, appellant filed in the United States District Court for the Northern District of Georgia its bill (F.R. 1). The Interstate Commerce Commission and the United States answered. After hearing the said Court rendered its opinion and entered its decree of October 26, 1928 [28 Fed. (2d) 885]. In its opinion, after stating the facts, the Court said:

> "Two methods of valuing the common stock are contended for, one, that it was worth the value of the roads acquired, less the value represented by the preferred stock; the other that it was worth what the Coast Line

Company paid for it in cash, $4,080,000. The requirement of the order of December 21st, 1926, that the common stock must be reckoned 'on a basis not in excess of the amount received therefor' comes to the same thing as the requirement of rule 41 and meets the same divergent constructions. It can not be said with accuracy that the money paid by the Coast Line Company was received by the Coast Company for its stock. The Coast Company received for the stock the deed of the bondholders' representatives covering the railroads, and they in turn sold the common stock to the Coast Line Company, and for a consideration not only of $4,080,000 actually paid, but also of heavy guaranties of dividends on the preferred stock over and above its par already allowed in this valuation." [28 Fed. (2d) 886].

The District Court also found that the entry in the account as to "Investment in Road and Equipment"—account 701—*"should be fixed on a basis of the fair cash value of the property acquired by the Coast Company in exchange for its stock as of the date of its acquisition."* [28 Fed. (2d) 885, 887]. (Italics added).

It then decreed:

" . . . *that the equities are with the complainant* and that the order of April 9th, 1928, complained of, in so far as the same fixed the amount at which the complainant is to return its capital stock and its investment in road and equipment, be set aside and all persons interested in the enforcement of said order, and their officers and agents, are permanently enjoined from enforcing the same, and that the supplemental application of the complainant in which said order was entered by the Interstate Commerce Commission stand for further hearing before said Commission." [28 Fed. (2d) 886; Italics added].

FOURTH ORDER OF THE COMMISSION (158 I. C. C. 6).

After the Interstate Commerce Commission had determined not to appeal from the first decree of the District Court above referred to, it set the case for further hearing before its examiner. The Commission made a report on October 9, 1929 (158 I. C. C. 6—Reorganization and Control of Atlanta, Birmingham & Atlantic Railway Company). The headnote of that report is as follows:

> "Upon further hearing, application of Commission's accounting regulations to statement of the investment accounts of the Atlanta Birmingham and Coast Railroad Company as of January 1, 1927, considered and accounting prescribed." (158 I. C. C. 6).

The concluding paragraph of the report is as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the New Company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The Company will be expected to adjust its accounts in accordance with this finding within 60 days from the service of this report." (158 I. C. C. 6).

That figure—$9,261,043.87—was the identical figure which had been enjoined by the District Court in its first decree of October 26, 1928 [28 Fed. (2d) 885].

SECOND DECREE OF THE DISTRICT COURT [37 Fed. (2d) 401].

Atlanta, Birmingham and Coast Railroad Company then filed its supplemental bill against the United States, et al, in

the United States District Court for the Northern District of Georgia. Decree was rendered thereon on January 8, 1930, and the District Court by said decree enjoined the above stated action of the Commission (158 I. C. C. 6) determining that it amounted to an order.

APPEAL TO SUPREME COURT OF THE UNITED STATES, 282 U. S. 522.

The Interstate Commerce Commission appealed that decree to this Court—*United States v. Atlanta, Birmingham and Coast Railroad Company*, 282 U. S. 522 (decided February 24, 1931). This Court there held that the action of the Commission reported in 158 I. C. C. 6 and then under consideration did not constitute an order, and reversed the lower court.

DISCUSSION OF REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION DATED JULY 9, 1934—"ACCOUNTING FOR CAPITAL ITEMS, IN RE: A. C. L. RAILROAD CO. AND A. B. & C. RAILROAD COMPANY.

This is given docket number 25170 and is reported in 201 I. C. C. 645 and at R. 27, et seq. This report gives a resume of the previous actions of the Commission and of the courts. The Commission states that by its order of March 26, 1932, "upon our own motion and without formal pleadings, we entered upon the present inquiry and investigation and made the Coast Line Company and the Coast Company respondents thereto." (R. 30).

The findings of fact leading up to the Commission's conclusions which are stated beginning at record page 30, in so

far as they state the history of the proceedings are not inconsistent with what has been herein stated.

The Commission recites that the Atlanta, Birmingham and Atlantic Railway Company (therein referred to as the "Old Company") was the result of a reorganization in 1915 through which it acquired the properties formerly owned by the Atlanta, Birmingham & Atlantic Railroad Company and the latter's lessors, Georgia Terminal Company and Alabama Terminal Railroad Company. (These are the same properties as were valued by the Commission in its Valuation Docket No. 1, 75 I. C. C. 645). The Commission then recites the appointment of a receiver for those properties in 1921 (at that time they were owned by Atlanta, Birmingham & Atlantic Railway Company) and the formation of the agreement of February 23, 1926, the entering of a foreclosure decree on April 30, 1925; the sale under that decree on June 22, 1926; the purchase of the property under that sale by George E. Roosevelt and J. A. Fowler, Jr., on behalf of the Reorganization Committee upon condition that the Interstate Commerce Commission should within a time which in the opinion of the Court would be reasonable, grant authority enabling the execution of the plan and agreement of reorganization pursuant to the pending applications on behalf of the proposed Coast Company and of the Coast Line Company.

The Court conditionally confirmed that sale on June 23, 1926. The Commission made its report on October 25, 1926 (117 I. C. C. 181). The conditions which accompanied the bid were withdrawn and the Court on November 15, 1926, confirmed the sale unconditionally and the properties were thereupon conveyed to the purchasers by deed of the special

master of November 16, 1926, in which the Old Company, the Receiver, and the trustees of the first mortgage and the income mortgage joined. After that conveyance Fowler and Roosevelt as of January 1, 1927, conveyed this property to Atlanta, Birmingham and Coast Railroad Company (see deed, R. 333). This conveyance was made subject to such of the encumbrances mentioned in Exhibit A to the agreement of February 23, 1926 (R. 83), as were not discharged, satisfied or otherwise complied with or removed. The Atlantic Coast Line Railroad Company had discharged and acquired all of those encumbrances which were then due. Evidences of extinction of those liens were delivered to the Receiver together with a check for $1,323,410.88 payable to the order of the Receiver to cover back taxes of the Old Company and interest amounting to $488,929.57 and obligations of the Receiver for material and supplies amounting to $834,481.31, and also a letter of assumption of liability for any additional obligations of the Receiver which might arise (R. 35). The payments by the Coast Line Company and the Coast Company made a total of $4,214,774.42 (R. 35). These afterwards became $4,248,413.79 (R. 38).

The Commission concludes its report (201 I. C. C. 645) at 671 with these words:

> "We find that the market or fair cash value of the properties in question did not exceed the sum of $9,428,-713.76, as of January 1, 1927." (R. 60).

IV.

ASSIGNMENT OF ERRORS

Appellant relies upon each and all of the errors assigned by it and found at record pages 342, et seq., and which are as follows:

The District Court erred in that:

1. It denied the prayer marked "D" of the thirty-sixth paragraph of appellant's complaint, especially so much thereof as prayed that the Interstate Commerce Commission, its officers, agents and employees be permanently enjoined from enforcing its order of July 9, 1934 (201 I. C. C. 645) by which it ordered that:

> "The Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to eliminate from account 751, 'Capital Stock,' all liability on account of non-par common stock in excess of $4,248,413.76";

and in which it further ordered

> "That the Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to state the balance in account 701, 'Investment in road and equipment,' in accordance with the classification of investment in road and equipment as provided under account 41, 'Cost of road purchased,' and in conformity with the preceding paragraph hereof";

and in which it further ordered

> "That this order shall take effect and be in force from and after thirty days from the date of service hereof."

2. By its decree aforesaid the court denied appellant's prayer marked "E" of the thirty-sixth paragraph of said

bill of complaint which sought to have the said order of the Interstate Commerce Commission of July 9, 1934, held to be invalid and illegal upon each of the grounds set forth in appellant's bill of complaint.

3. The court should have found that the order of the Interstate Commerce Commission complained of was arbitrary for that:

(a) It was contrary to the evidence adduced before the Commission in this proceeding;

(b) The Commission based its order on the erroneous finding that the transaction was one in which the Atlanta, Birmingham and Coast Railroad Company sold its shares of stock to the Atlantic Coast Line Railroad Company in consideration of the latter company's furnishing to or for it moneys with which to pay items of prior indebtedness upon said properties; whereas, the Atlanta, Birmingham and Coast Railroad Company issued its shares of preferred and common stock to representatives of the bondholders of the old Atlanta, Birmingham and Atlantic Railway Company in consideration of the conveyance to it, by said representatives, of the properties of the old Atlanta, Birmingham and Atlantic Railway Company and its receiver, free of liens.

(c) It did not give to the valuation made by the Interstate Commerce Commission of the properties acquired by the Atlanta, Birmingham and Coast Railroad Company, which were formerly owned by Atlanta, Birmingham and Atlantic Railroad Company, Georgia Terminal Company and Alabama Terminal Rd. Co., the prima facie effect which the law attributes to such findings.

4. The court should have found that the Interstate Commerce Commission in stating the value of the 640 miles of railroad and other properties to be $9,428,713.76, did not consider the evidence as to cost of con-

struction of the properties acquired by Atlanta, Birmingham and Coast Railroad Company; nor the evidence as to the value of the terminal properties in Atlanta, Georgia and Birmingham, Alabama, acquired by the Atlanta, Birmingham and Coast Railroad Co.

5. The court should have found that the Interstate Commerce Commission did not give any consideration to the value of the properties acquired by the Atlanta, Birmingham and Coast Railroad Company. It should have found that the only witness introduced by the Commission as to valuation stated that he did not consider the value on January 1, 1927, of any of the physical properties acquired by the Atlanta, Birmingham and Coast Railroad Company from Roosevelt and Fowler as of the said date.

6. The court should have found that the sole witness for the Commission as to value stated that he did not reach any conclusion as to the value of any specific pieces of property acquired by the Atlanta, Birmingham and Coast Railroad Company in exchange for its stock.

7. The court should have found that the Interstate Commerce Commission in making its purported valuation left out of consideration the cost of reproduction of the property, and the value of the property as an element in connecting the Atlantic Coast Line Railroad Company with its subsidiaries and the completion of its System, including connection between the Atlantic Coast Line Company's lines and those of the Louisville and Nashville Railroad Company; and that likewise the Commission treated as irrelevant and immaterial its own valuation of this property as of June 30, 1914, although the value was shown to be greater on January 1, 1927, than on June 30, 1914; as to all of which there was ample evidence.

8. The court should have found that the Commission erred in applying to the transaction at hand by which the Atlanta, Birmingham and Coast Railroad Company acquired the properties now owned by it, a rule different from the rule customarily applied by it in cases of similar reorganizations; to the injury of the Atlanta, Birmingham and Coast Railroad Company.

9. The court should have found that the judgment and decree of the District Court in the case of *Atlanta, Birmingham and Coast Railroad Company v. United States of America* [28 Fed. (2d) 885] was res adjudicata as to the nature of the transaction under which the stock of the Atlanta, Birmingham and Coast Railroad Company was issued, as to the meaning of the condition in the Commission's order of December 21, 1926, authorizing the Railroad Company to issue its securities, and as to there being but one question left for determination which was the value of the property received by the Railroad Company in exchange for its stock as of January 1, 1927.

10. The court should have found that the Commission was influenced in its finding by the erroneous idea that the par value of the preferred stock plus the amount paid by the Atlantic Coast Line to the Bondholders' Committee for the common stock was the sole question for determination rather than the value of the property itself, and that the finding of the Commission was arbitrary and void because it treated such par value and price paid as the ultimate fact to be determined.

11. The court should have found that the Commission was laboring under a misconception as to the meaning of the condition "that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor," contained in the Commission's order of December 21, 1926, authorizing the is-

suance of the stock, and that the Commission's finding of value was arbitrary and void because it was necessarily influenced by this misconception.

12. The decree of the District Court appealed from in this cause fails to meet the requirements as to findings of fact and of law as set forth in Federal Equity Rule No. 70½.

13. The decree of the District Court appealed from in this cause is contrary to the evidence.

14. The decree of the District Court appealed from in this cause is contrary to the law.

Summarization of Assignment of Errors and Points to be Relied Upon.

The assignment of errors and the points to be relied upon (R. 352) may be summarized as follows:

The Interstate Commerce Commission erroneously and unlawfully ordered that the Atlanta, Birmingham and Coast Railroad Company should in opening its books of account show Account 701—"Investment in road and equipment"—at $6,729,986.03; and it likewise erroneously and unlawfully ordered that the Atlanta, Birmingham and Coast Railroad Company should adjust its current accounts to eliminate from account 751—"Capital stock"—all liability on account of non-par common stock in excess of $4,248,413.76.

The District Court erred in refusing to grant the prayers of appellant's bill of complaint (R. 25) wherein it prayed that the order of the Interstate Commerce Commission of July 9, 1934, "be held to be invalid and illegal upon each of the grounds" in said bill set out.

SUMMARY OF ARGUMENT

I. The Interstate Commerce Commission values the properties involved at $9,428,713.76 by stating the value of the preferred stock at $5,180,300.00 and determining the value of the no-par value common stock at $4,248,413.76. This prescribes the entries to be made in Account No. 751 "Capital Stock." To determine the balancing entry in Account No. 701 "Road and Equipment" on the asset side of appellant's books it follows that the value of the road and equipment must not exceed $6,729,896.03, "other assets" being $2,698,817.73.

Appellant contends that these figures are not supported by the evidence and are arbitrary and capricious. The cost of the properties obtained by exchange of the entire capital stock of appellant *is not the value of the stock*, but necessarily is the *value of the property itself* as of January 1, 1927. The stock had no value and has now only such value as the properties give it. P. 31.

II. Appellant contends that the fair value of all its properties for accounting purposes is $26,708,953.20. The entry on the asset side in Account No. 701 "Road and Equipment" should be $24,010,135.47, together with "other assets" of $2,698,817.73. The value of Road and Equipment must be determined before the balancing entry on the liability side, "Capital Stock," can be found. The resulting entries in Account 751 "Capital Stock" would then be preferred stock $5,180,300.00, no-par value common stock $21,528,653.20. P. 40.

III. The Interstate Commerce Commission's valuation of the common stock of appellant, which necessarily is the value of the entire railroad properties less the par value of the

preferred stock, does not take into consideration all of the elements of value inherent in the property. P. 41.

(a) The Commission's valuation ignores the element of the value of the property for rate-making purposes. P. 42.

(b) The Commission's valuation ignores the reproduction value of the properties. P. 46.

(c) The Commission's valuation violates paragraph 5(i) of Section 19a of the Act to Regulate Commerce as amended, and ignores prior tacit approval by the Commission of the figures used in the same accounts by the predecessors of appellant. P. 49.

(d) Changes in conditions as of January 1, 1927, did not have the effect of overcoming the prima facie effect of the Commission's valuation as of June 30, 1914, of these properties. P. 52.

(e) The entries required by the Commission's order now under review do not reflect the history and the improved earnings of these properties as of January 1, 1927. P. 60.

(f) No consideration of the strategic value of these properties was given by the Commission, which value was real and inherent in these properties so soon as they came into the control of the Atlantic Coast Line. P. 62.

IV. The valuation provided for in the Interstate Commerce Commission's order is clearly predetermined and the report recites as supporting testimony only *such parts* of the witnesses' statements as tend to give credence to its reasoning. It ignores the ultimate facts of all of appellant's testimony and

is not supported by the witness Boles when his testimony is analyzed. He had *never seen* the properties. Wrong principles of law are applied to incomplete statements of fact as brought out by the testimony and the underlying findings and the theory of the report are improper and unlawful. The application of the valuations found by the Commission leads to impracticable and impossible results. P. 72-82.

V. The law applicable to the case is elementary and plain. This Court will examine the report and order of the Commission, as well as the record before it, to determine whether findings are made on which the jurisdiction of the Commission can rest. This Court will also determine whether *basic intermediate and ultimate* findings have support from the evidence adduced. P. 84.

V.

ARGUMENT

Value of the Property Acquired by Appellant.

It has been previously shown that the property involved in this case is the same as that which was owned by Atlanta, Birmingham and Atlantic Railroad Company, Georgia Terminal Company and Alabama Terminal Railroad Company and then by Atlanta, Birmingham and Atlantic Railway Company and that these properties were valued by the Interstate Commerce Commission in a proceeding known as Valuation Docket No. 1, Atlanta, Birmingham and Atlantic Railroad Company, et al, 75 I. C. C. 645; that the valuation was made July 20, 1923, as of June 30, 1914.

These properties were put up for sale at foreclosure sale and were conditionally bid in and upon the rendition of the decision of the Interstate Commerce Commission—Reorganization and Control of Atlanta, Birmingham & Atlantic Railway Company, 117 I. C. C. 181, the conditions were removed and the sale made absolute. It has also been shown that on December 21, 1926 (117 I. C. C. 439) when the New Company was granted the right to issue shares of preferred and common stock, the authority was granted upon the express condition that

> "for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of Account 41, 'Cost of Road Purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor."

We have shown that the foreclosure sale was had for the purpose of vesting the title to the properties now owned by the New Company and here involved, in that New Company, to-wit: Atlanta, Birmingham and Coast Railroad Company. The property offered at foreclosure sale was bid off by Messrs. Roosevelt and Fowler as representatives of the Reorganization Committee of the holders of two issues of bonds which affected the property. It was then found that the New Company had not been incorporated and the Commission approved the sale subject to the incorporation of the New Company. The title to this property was conveyed to Messrs. Roosevelt and Fowler as the representatives of the Reorganization Committee and after Messrs. Roosevelt and Fowler and their asso-

ciates had caused the Atlanta, Birmingham and Coast Railroad Company to be incorporated under the laws of Georgia which were applicable to railroad properties sold at foreclosure sale, there was then a meeting in New York on January 4, 1927, to pass the title to this property into the New Company as of January 1, 1927. The evidence is undisputed that at that time the property was conveyed by Messrs. Roosevelt and Fowler to the New Company and the deed is shown in the record as Exhibit No. 16, page 333.

Messrs. Roosevelt and Fowler then owned the shares of preferred and common stock of Atlanta, Birmingham and Coast Railroad Company. They had received those shares of stock from that Company in consideration of the acquisition by it of this property. Roosevelt and Fowler put up no money, or if they put up any money it was barely the qualifying amount with which to bid for the property at the foreclosure sale. The property was purchased and was paid for by "other than cash."

The Interstate Commerce Commission's Accounting Rule No. 41 is as follows:

> "COST OF ROAD PURCHASED.
>
> "This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only road, but also equipment, securities, and other assets, the appraised value of such equipment, securities and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash

basis. If the consideration includes the assumption of liabilities, such liabilities shall be included in the determination of the cost at their cash value at the time the contract is made.

"This account shall be used only as a clearing account in which temporarily to carry the cost of road purchased until such time as a plan for distributing such cost to the primary accounts appropriate for the property is approved by the Commission."

It will be noted that the rule provides that

"Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis."

It is contended by our opponents that this property was paid for in cash. This claim is based upon the agreement of February 23, 1926, which has been referred to and under which the Atlantic Coast Line Railroad Company agreed to pay the items mentioned in Exhibit A to that agreement (R. 83) and there stated at $3,677,500. Those items had priority over the bonds and were called "Priorities." The Atlantic Coast Line was required to provide the money to pay the prior claims which were then due and to contract to pay those which were not then due when and as they became due.

The purchasers at the meeting referred to on January 4, 1927, were in possession of the shares of stock of Atlanta, Birmingham and Coast Railroad Company which they had caused to be organized. The purchasers also turned the 150,000 shares of common stock of Atlanta, Birmingham and Coast Railroad Company over to the Atlantic Coast Line Railroad Company in consideration of the Coast Line's surrendering a substantial amount of the indebtedness referred

to as Priorities which it had purchased and in addition thereto the Coast Line *delivered to the Receiver* for Atlanta, Birmingham and Atlantic Railway Company a check for $1,323,410.88 (F.R. 328) to cover the following items set out in Exhibit A to the agreement of February 23, 1926:

Taxes $488,929.57

Materials and supplies:

(1) Claims prior to receivership (Six months' claims) 355,057.00

(2) Receiver's obligations ..... 479,424.31.

The Coast Line Company also delivered another check for $600,000 to the Reorganization Committee to enable it to pay the last item in Exhibit A to said agreement of February 23, 1926, which was for Receivership, reorganization and miscellaneous expenses and allowances. $600,000 was to be the maximum amount for those items.

All of the items mentioned in said Exhibit A were then provided for by those three things, to-wit:

1. Surrender of cancelled obligations acquired by Atlantic Coast Line Railroad Company;
2. Delivery of the two checks above mentioned; and
3. Assumption by Atlantic Coast Line Railroad of unmatured obligations listed.

In the meantime the sale of these properties at foreclosure had been had as far back as June 22, 1926. The Interstate Commerce Commission had approved the acquisition of the property by the New Company (117 I. C. C. 181). The pur-

chasers, Roosevelt and Fowler, and their Associates had been incorporated into Atlanta, Birmingham and Coast Railroad Company on the 22nd day of November, 1926, and the Interstate Commission on December 21, 1926, had issued its order (117 I. C. C. 439) allowing the transfer of the property to the New Company and providing that for

> "the purposes of the accounting, as provided in classification of investment in road and equipment in the text of Account 41 'Cost of Road Purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor." (117 I. C. C. 443).

The reason why the Commission prescribed the use of its Accounting Rule 41 was that this property had been sold to Atlanta, Birmingham and Coast Railroad Company in consideration of that Company's preferred and common stock and the persons who received those shares of preferred and common stock for this property were those who had purchased the property at the foreclosure sale.

The transaction here involved was completed when the New Company—Atlanta, Birmingham and Coast Railroad Company—acquired this property from Roosevelt and Fowler who had purchased it at foreclosure sale, and paid to them for it, its shares of common and preferred stock. This is discussed cogently by the District Court in its second opinion on this subject matter in the case of *Atlanta, Birmingham and Coast Railroad Company*, 37 Fed. (2d) 401 at 402 as follows:

> "The concluding words 'Provided, however, and authority to issue said stock is granted upon the express

condition that . . . the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor,' can mean only the amount received by the Coast Company for its stock, and not what was paid by the Coast Line Company to the bondholders' Committee for it. *The Coast Company received, and was, under the reorganization plan, to receive not a dime of money, but only a deed to the railroads. So far as it was concerned it paid no cash for the deed, but only its stock.* The Commission's accounting regulation No. 41, referred to expressly in the order of December 21st, 1926, requires 'where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis.'

"The stock which constituted the consideration for the roads must, therefore, be valued on a cash basis. Because it represented on January 1st, 1927, nothing except the railroads purchased, it can be valued only by valuing them. So that the requirement of the regulation and of the condition in the order come practically to the same thing, each necessitating a valuation of the railroads as of January 1st, 1927. Notwithstanding the close connection between the Coast Line Company and the new Coast Company, they are separate corporations. The New Company is but beginning its career. Its stockholders may change and creditors having separate interests may arise. Separate corporate organization can sometimes be disregarded in order to defeat fraud or reach the true rights of stockholders and creditors, but the separate accounting of railroads under the Interstate Commerce Act presents no such case. This separately organized railroad enterprise is entitled to have its separate and independent accounts under the usual regulations, and this was plainly indicated by the order of December 21, 1926. *The entry here in question may hereafter constitute admissible evidence in fixing rates, recapture of profits, ascertainment*

of depreciation, assessment of ad valorem taxes and the like. The purchase of the railroads by the Coast Company with its stock was its own transaction. It was unaffected (save that the foreclosure sale was held up until the Coast Line Company should fully pay its assumptions to the bondholders' committee) whether those assumptions had turned out to be $3,677,500.00, as was first supposed, or $4,080,697.00 as turned out to be true, or $10,000,000.00 as might have happened. In any case the cash value of the railroads diminished by the undisputed value of the preferred stock represents the investment of the common stock under accounting regulations No. 41 and under the terms of the enabling order of December 21st, 1926. The cash payments by the Coast Line Company in acquiring the common stock from the bondholders' committee did not necessarily measure its value, nor did they make the purchase by the Coast Company of the railroads a cash transaction so as to put into operation the provisions of regulation No. 41 touching cash purchases.

"It is true that regulation seeks to have recorded the historical fact of the amount invested rather than the value of the investment. The necessary exception recognized in the regulation does exist when, as here, the purchasing company does not pay cash. The Coast Line Company's purchase of the stock has this much to do with it: It is a voluntary cash transaction occurring at the critical time and having a close relationship to the value of the railroads, inasmuch as it expresses their value as estimated by the bondholders' committee and the Coast Line Company. It is evidence, but not the exclusive nor conclusive evidence of the then actual cash value of the railroads." (F.R. 501-2).

By its decree, the Court adjudged:

"That the equities are with the complainant, and that the order of October 29th, 1929, of the Interstate Com-

merce Commission herein complained of, in so far as the same fixes the amount at which complainant is to return its capital stock and its investment in road and equipment, be set aside and that the persons interested in the enforcement of said order, and their officers and agents, are permanently enjoined from enforcing the same, and that the supplemental application of the complainant on which said order was entered by the Interstate Commerce Commission stand for further hearing before said commission."

The District Court in its opinion in the case at bar (*Atlanta, Birmingham and Coast Railroad Company v. United States,* not yet reported, see R. 339) stated that they were not dissatisfied with their former findings in this case made in the two preceding hearings, including those above quoted [the other hearing being *A. B. & C. Rd. Co. v. United States,* 28 Fed. (2d) 885] but that they found it unnecessary to reassert them. In other words, the District Court, in the case at bar, again found that the Atlanta, Birmingham and Coast Railroad Company had acquired the property involved and paid for it by issuing its preferred and common stock to Roosevelt and Fowler as representatives of the Reorganization Committee.

No appeal was taken from a similar finding by the District Court in its first review of this case [*A. B. & C. Rd. Co. v. United States,* 28 Fed. (2d) 885]; and no ruling was made by this Court on this finding in the appeal from the second case before the District Court [37 Fed. (2d) 401]. It is a final determination.

It is clear therefore that in order to solve the problem at hand we must find what was the value on January 1, 1927, of the property which was acquired by Atlanta, Birmingham and Coast Railroad Company on that date.

VALUE CLAIMED BY APPELLANT AND COMMISSION'S VALUATION.

Atlanta, Birmingham and Coast Railroad Company claims that this value should be $24,010,136.47. That figure is arrived at by taking the Commission's final single sum value as of June 30, 1914 (Valuation Docket 1, 75 I. C. C. 645), and adding thereto the net of additions and betterments less retirements plus certain physical changes made but not recorded at December 31, 1926 (See evidence of the Witness Bell, R. 205-6).

The Interstate Commerce Commission claims that the value of the property was then $9,428,713.76 and the Commission's order of July 9, 1934, requires appellant to set up its books as follows:

Assets:

Account 701—Road and Equipment	$6,729,896.03
Other assets	2,698,817.73
Total	$9,428,713.76

Liabilities:

Account 751—Capital stock account:	
Preferred stock	$5,180,300.00
Common stock	4,248,413.76
Total	$9,428,713.76.

Appellant had proposed to set up its accounts as follows (R. 274, 327, Exhibit 10):

Assets:	
Account 701—Road and Equipment	$24,010,135.47
Other assets	2,698,817.73
Total	$26,708,953.20
Liabilities:	
Account 751—Capital stock account;	
Preferred stock	$ 5,180,300.00
Common stock	21,528,653.20
Total	$26,708,953.20

EXAMINATION OF THE COMMISSION'S VALUATION.

The Commission's valuation of $9,428,713.76 is based upon the par value of the preferred stock ($5,180,300) plus the amount which the Atlantic Coast Line Railroad Company had spent to purchase the shares of common stock of the New Company from Roosevelt and Fowler, the purchasers, at the foreclosure sale as contemplated by the agreement of February 23, 1926; that is, in the purchase of certain outstanding prior obligations of Atlanta, Birmingham and Coast Railway Company and the assumption by it of certain obligations of the Railway Company which had priority but which were not then due and in the furnishing by it of cash to the Receiver

and to the Reorganization Committee to enable them to pay the prior items hereinbefore referred to—all of which items aggregated the sum of $4,248,413.76. This figure which the Commission claims should be set up as the cost of the common stock was increased in the *last report* of the Commission because it found that the Coast Line Company had paid more for the items than the amount set out in Exhibit A to the agreement of February 23, 1926.

The Commission in Making Its Valuation of A. B. & C. Railroad Co.'s Property Did Not Take Into Consideration All of the Elements Which Should Have Been Taken Into Consideration.

Accounting Rule No. 41 which has been hereinbefore quoted contemplates that property which is acquired for other than cash must be valued at that which it paid for it. To determine the cost of the stock of Atlanta, Birmingham and Coast Railroad Company which was exchanged for the railroad property, fully equipped and a going concern, the railroad property must be valued. The value of the property received is the cost or price of the stock. Atlanta, Birmingham and Coast Railroad Company, appellant, received for its shares of stock, common and preferred, all of the assets of the Atlanta, Birmingham and Atlantic Railway Company under orders of the Commission, accounting rules and determinations of the court below. The value of that stock is to be determined by the value of those properties which were purchased with the stock.

The Commission did not purport to comply with this plain and necessary rule.

One of the qualities which it eliminated from the property to be valued was its value for rate-making purposes. It drew quite a distinction between the value for rate-making purposes and the market or exchange value, saying in its report (201 I. C. C. 670, R. 59):

> "It is apparent from the qualification stated in connection with our determination of the value for rate-making purposes of the properties in question, that such valuation was in no sense an expression of market or exchange value."

At this point the Commission cites its Valuation Docket No. 1, Atlanta, Birmingham & Atlantic Rd. Co., et al, 75 I. C. C. 645, at 665, et seq., which states:

> "The value we are required to establish, therefore, is a value determined for the specific purposes of governmental regulation under the Interstate Commerce Act. That value must embrace all of the property used by the carrier for purposes of transportation, whether owned by it or leased from others, and must include any intangible value that inheres in the property because of its use.
>
> "We are not concerned with a value for purposes of sale or of condemnation, which in either case might well be something different from the value of the same property for the purposes of governmental regulation, for there is in contemplation in such cases the transfer of the ownership of property and of rights in property and in a case of condemnation the possible destruction of certain property rights, and there must be included the value of non-carrier property."

If there be a difference in the two values why should not the property here involved have the advantage of that differ-

ence? Beyond any shadow of doubt it is entitled to the quality of a rate-making value.

The above quotation indicates that one value may be greater than another. Why should the lesser of these two values be taken for this property? Has the element of valuation been given full force and effect, if it leaves out any quality? The valuation rules do not eliminate any quality of value.

In the case of *St. Louis & O'Fallon Rd. Company*, 279 U. S. 461, at 484 this Court held:

> "Paragraph 4, § 15a, directs that in determining values of railway property for purposes of recapture the Commission 'shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes.' This is an express command; and the carrier has clear right to demand compliance therewith."

The Court cites *United States, ex rel., Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U. S. 178.

The Court further holds:

> "The elements of value recognized by the law of the land for rate-making purposes have been pointed out many times by this Court," and cites
>
> *Smyth v. Ames*, 169 U. S. 466;
>
> *Willcox v. Consolidated Gas Co.*, 212 U. S. 19;
>
> *Minnesota Rate Cases*, 230 U. S. 352;

Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276;

Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679;

McCardle v. Indianapolis Water Co., 272 U. S. 400.

The Commission in the case at bar has undertaken to give one and only one valuation to this property and that is the market or exchange value.

In its first report on this subject matter (117 I. C. C. 181) at 186-7 the Commission said:

> "There is no difficulty in reaching the conclusion that from the standpoint of transportation service the proposed reorganization and control by the Atlantic Coast Line is in the public interest. The sentiment in favor of the plan in the territory served by the A. B. & A. is apparently unanimous and earnest. Approval should therefore be given and the necessary authority issued, unless there be something in the terms and conditions of the proposed acquisition, or in the consideration, so inequitable as to require modification in the public interest. We find nothing of this character in the arrangement. It is true that there is wide disparity between the proposed price to be paid by the Atlantic Coast Line for its control of the property and the value of the property viewed as a basis for rate making, but our highest court has distinguished between value for rate-making purposes and exchange value."

Citing

Galveston Electric Company v. Galveston, 258 U. S. 388;

REPRODUCTION VALUE.

In ascertaining the value of this property in this case the Commission puts to one side reproduction value although in the *O'Fallon Railroad Case, supra,* at page 484 after referring to elements recognized by law for rate-making purposes says:

> "Among them is the present cost of construction or reproduction."

The Court then says:

> "Thirty years ago, *Smyth v. Ames* announces (546):
>
> 'We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probably earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

The witness Willoughby, who was Chief Engineer of this property, at page 174 testified:

> "I have not made any investigation relative to what would be proper unit prices to apply to the Atlanta, Bir-

mingham and Coast but I have made an investigation as to what would be proper unit prices to apply to the Atlantic Coast Line Railroad in Georgia and Alabama in bringing the value of that road up to date as of December 31, 1927. Those figures are what we called the 1925 price level, assuming the same practice which the Bureau followed in determining the 1914 price level. Regarding what would have been the cost of reproducing the property of the Atlanta, Birmingham and Coast as of January 1, 1927, assuming those figures are proper to be applied —the studies on the Atlantic Coast Line Railroad for the States of Georgia and Alabama determined that the ratio of the 1925 price level to the 1914 price level would be 1.85 for the items in the engineering report and would be 1.59 for items in the land report. If we applied the same ratio to the report rendered by the Commission on the Atlanta, Birmingham & Atlantic as of June 30, 1914, the reproduction cost new of the Atlanta, Birmingham and Coast on January 1, 1927, would be for items in the engineering report $32,341,195, and for items in the land report $1,988,365, a total of $34,329,560. That does not include the lands in non-carrier service. That includes the property which the Commission reported to the Atlanta, Birmingham & Atlantic Railroad and not the property, as I understand it, of the terminal company in Atlanta, the Alabama Terminal and the Georgia Terminal. It is exclusive of those. I mean one at Birmingham and one at Atlanta. There would have been a cost of reproduction new for equipment of $8,608,168, for general expenditures $4,211,751, for telegraph lines $158,388, a total of $12,978,307. In determining the value, that is, the reproductive value of the equipment as given above, I used the sums of money that were reported as the 1914 value in the I. C. C. report on the Atlanta, Birmingham & Atlantic and multiplied Account 51 by two, Account 53 by 1.78, Account 54 by 1.69, Account 57 by 1.91, and for the telegraph line by

1.50. These factors were those that were introduced by the Bureau of Valuation in the Richmond, Fredericksburg & Potomac recapture proceeding, Finance Docket No. 3898.

"For the general expenditures I used the same percentages that the Bureau of Valuation used in the 1914 value; that is, reproduction value, of the Atlanta, Birmingham & Atlantic. According to my investigation there would have been a total of some $47,307,867 required to reproduce the properties which were covered in the valuation of the Atlanta, Birmingham & Atlantic Railway Company made by the Commission as of 1914, exclusive of the terminals referred to in that report; not including those items that have been added to the Atlanta, Birmingham & Atlantic since the valuation date under the Commission's Valuation Order 3." (R. 174-175).

It will be noted that Mr. Willoughby's evidence did not include those items which had been added to the property of the A. B. & A. Railway Company since the valuation date of the Commission's Valuation Order No. 3 and his report was exclusive of the terminals referred to in the Commission's report (R. 75).

At the subsequent pages of his testimony Mr. Willoughby gives additional details as to the manner in which he made his estimate. He testified at R. 182 as follows:

"I think if the Atlanta, Birmingham and Coast were not existent it ought to be reproduced substantially as it is and as an engineer I am tinctured with the idea that the value of a property is its reproduction cost."

He adds further that if the property were reproduced the Atlantic Coast Line ought to own it (R. 182). These statements are repeated at R. 183. He further states (R. 183):

"I would say that the property is worth more for every purpose to which a railway can be put."

He means by that that the property was on January 1, 1927, worth more than it was on January 1, 1914.

The Atlanta, Birmingham and Coast Railroad Company is seeking to use a valuation in the opening entries on its books of account a sum very much less than what would have been the cost of the property if it had been constructed as of January 1, 1927, which cost, as stated, would have been $47,307,867.

See also Colonel Bugg's testimony as to reproduction cost (R. 234 et seq.), discussed at p. 65 of this brief; and the witness Edwards' testimony on the same subject (R. 225), discussed at page 57 of this brief.

Valuation Under Section 19a of the Act to Regulate Commerce.

It is provided under subsection 5(i) of Section 19a of the Act to Regulate Commerce that:

> "All final valuations by the Commission and the classification thereof shall be published and shall be *prima facie* evidence of the value of the property in all proceedings under the Act to Regulate Commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as 'the Act to Regulate Commerce,' and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The District Court in *Atlanta, Birmingham and Coast Railroad Company v. United States*, 37 Fed. (2d) 401, at 403 said:

> "The Commission's valuation of railroads is expressly made *prima facie* proof in all proceedings under the Commerce Act. This is such a proceeding. It follows that the Commission's conclusion that this valuation was 'neither pertinent nor material evidence in the determination of investment' was erroneous in this case, where the investment was not of cash, but must be determined by the ascertainment of value."

The District Court then determined that the valuation of this property had been unlawfully arrived at by the Commission because it had refused to give that prima facie force and effect to the valuation made under Section 19a which the law required.

Under the provisions of Section 19a of the Act to Regulate Commerce, the Commission is required to do many things in ascertaining the value of railroad property, including making of inventories, the classifying of the physical property; the ascertaining and reporting in detail as to each piece of property, other than land, owned or used by common carriers for its purposes as a common carrier; the original cost to date; the cost of reproduction new; the cost of reproduction less depreciation; and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission is required to make an investigation and report in detail and separately from improvements the original cost of all lands, rights of way and terminals owned or used for the purposes of a common carrier.

In its final report (Valuation Docket No. 1, 75 I. C. C. 645) the Commission said:

"The final single sum value which we have ascertained for the property of the carrier is based upon a careful consideration of all the relevant facts that have come to our attention. It is in our judgment a value which we are authorized by the Valuation Act to ascertain and report, and we have ascertained and now report it as the final value of the property of this carrier for rate-making purposes. It is the fair value of the property which the carrier holds for and uses in the service of transportation and upon which it is entitled to earn a fair return." (75 I. C. C. at 666).

The Atlanta, Birmingham & Atlantic Railway Company thought this valuation was too small and contested it.

The amount of investment in road and equipment reported as of December 31, 1916, was as follows:

Atlanta, Birmingham & Atlantic Rd. Co.	$52,197,059.97
Georgia Terminal Company.....	4,831,113.06
Alabama Terminal Railroad Company.	5,791,226.98
Or a total equipment in road and equipment of	$62,819,400.01.

(See R. 191)

The Atlanta, Birmingham and Atlantic Railroad Company set up on its books as of January 1, 1916, this account at $38,760,149.87, this being a reduction of $24,059,250.14. (R. 191).

The Atlanta, Birmingham and Coast Railroad Company desires to set up this account (No. 701—Investment in road and equipment) at $24,010,135.47, notwithstanding the fact there has been added more than $1,000,000.00 to the property since the title passed to the Atlanta, Birmingham & Atlantic

Railway Company in 1916. That means that appellant is undertaking to set up Account No. 701 at approximately $40,000,000.00 less than the recorded cost (R. 191). The figures at which this account had been stated were shown in the annual reports of the carriers to the Interstate Commerce Commission and had been constantly received by the Commission over many years.

The Atlanta, Birmingham & Atlantic Railway Company, then in the hands of a Receiver, as of December 31, 1926, reported to the Commission this Account No. 701 at $38,596,400.62. That report covered the same property which as of the next day—January 1, 1927—Atlanta, Birmingham and Coast Railroad Company desires to set up at $24,010,135.47, or about $14,000,000.00 less than the figures at which it had been returned by the Atlanta, Birmingham & Atlantic Railway Company and its Receiver for a great many years. In the light of these circumstances it would seem that the valuation proposed by the Coast Company for its Account 701 is exceedingly modest.

These entries and reports have evidentiary value. See *Southwestern Bell Tel. Co. v. City of San Antonio, Texas*, (C. C. A. 5th Circuit) 75 Fed. (2d) 880.

Changes in Conditions as of January 1, 1927, Did Not Have the Effect of Overcoming the Prima Facie Effect of the Commission's Valuation as of June 30, 1914, of this Property.

In Reorganization and Control of Atlanta, Birmingham and Atlantic Railway Company, 158 I. C. C. 6, decided November

9, 1929, the Commission took the position that its findings of value as reported in 75 I. C. C. 645 and which related to June 30, 1914, had no evidential value whatever in this case. In a review of the Commission's report and order of November 9, 1929, the District Court [*Atlanta, Birmingham and Coast Railroad Company v. United States*, 37 Fed. (2d) 401] disapproved that position.

In the case at bar the Commission found that its valuation report of June 30, 1914 (Made on July 20, 1923, 75 I. C. C. 645) had prima facie effect (R. 59-60) but it held that this prima facie effect had been overcome and made a greatly different valuation of this property in its report now under consideration.

This makes it appropriate for us to investigate some of the elements which went into the valuation of this property as of January 1, 1927, as compared with those same elements as of June 30, 1914.

Colonel Bugg, President of Atlanta, Birmingham and Coast Railroad Company, and who has been connected with this same property for more than twenty years, at record 234 compares gross revenues and railway operating income of this property in 1914 with those in 1925 and 1926, as follows: In 1925, freight revenue $4,649,625; in 1914 it was $2,081,554, in increase of $2,568,071 or 123.4 per cent. Passenger revenue in 1926 was $518,168; in 1914 it was $599,656, a decrease of $81,488, or 13.6 per cent. The gross revenue in 1926 was $5,726,345; in 1914 it was $2,945,103, in increase of $2,781,242 or 94.4 per cent. The Railway Operating Income, that is net after taxes, in 1926 was $345,061 and in 1914 it was $253,520, in increase of $91,496 or 36.1 per cent. (R. 234).

The same witness also made a statement of the population of Georgia and Alabama counties served by the Atlanta, Birmingham and Coast Railroad Company as shown in the United States Census reports as follows:

In Georgia the population of these counties in 1930 was 726,556; in 1910 it was 545,961, an increase of 180,595 or 33.1 per cent. (R. 234).

In Alabama the population of these counties in 1930 was 588,252, and in 1910 it was 373,067, in increase of 215,185 or 57.7 per cent. The total population of the counties in Georgia and Alabama in 1930 was 1,314,808; in 1910 it was 919,028, in increase of 395,780, or 43 per cent. (R. 234).

He then gives a statement of the assessed values of real estate in Georgia and Alabama in 1914 as compared with those in 1926, as follows:

The assessed value of real estate in Georgia for the year 1914 was $514,917,710 and in the year 1926 it was $734,178,493; in Georgia for the year 1914 the assessed value was $387,709,124 and in the year 1926 it was $699,438,884. (R. 234).

The witness Bugg then adds:

> "I should say that, with the increase in population and with the increase of property values, railroad property would likewise increase in value." (R. 235).

In summing up his evidence as to the increase in values Colonel Bugg states:

> "The gross operating revenue of this property had increased in 1926 as compared with 1914 by 94.4 per cent. The population of the counties through which the road

runs in Georgia and Alabama had increased 43 per cent. The Florida traffic in citrus fruits and vegetables, and all those things which we call perishable, as well as the inbound movement into Florida, had increased. *I find all of the elements which make the value of a railroad property for any purpose, had greatly increased in* 1927 *or* 1926 *over* 1914, *and my opinion is, and my answer is, that for all purposes for which a railroad may be valued, the property now owned by the Atlanta, Birmingham and Coast Railroad Company was more valuable on January* 1, 1927, *than it was on January* 30, 1914." (R. 234-5).

See also testimony of the witness Willoughby at R. 174-5, 183, discussed at page 46 of this brief.

Further Evidence as to the Value of this Property on January 1, 1927.

The witness J. Lee Edwards, Vice-President of Atlanta, Birmingham and Coast Railroad Company, testified (R. 216, et seq.) that there was a large increase in industries in the territory served by the Atlanta, Birmingham and Coast Railroad Company between June 30, 1914, and January 1, 1927. He gave particulars fully sustaining that statement. For instance, on June 30, 1914, the only industries reached by the Atlanta, Birmingham & Coast tracks at Atlanta were two wholesale grocery companies, one newspaper storage warehouse, a temporary storage yard for storage of iron and steel structural material, and a small warehouse for storage of calcium carbide. Those industries produced about 200 cars of freight per year, on which there was estimated revenue of $10,000.00. (R. 217).

On January 1, 1927, there were twenty-eight industries reached by the Atlanta, Birmingham and Coast tracks at Atlanta producing 3,602 cars of freight, on which the estimated revenue was $275,320.00. (R. 217).

At Birmingham on June 30, 1914, the only industries served by the Coast Company's tracks were a lumber yard and local ice plant, these two producing annually about 100 cars of freight, with estimated revenue therefrom of $5,000.00. On January 1, 1927, there were at Birmingham sixteen industries served by the tracks of the Coast Company, producing about 2,854 cars per year, with a revenue of $93,825.00 (R. 217).

In 1914 this property was receiving from its Florida business approximately $261,859.00; and in 1926 that revenue had increased to $1,170,132.00, an increase of $908,273.00 (R. 177). The population of Florida in 1910 was 752,619, while in 1930 it was 1,468,211, or an increase of 95 per cent. between the two census dates.

The value of products manufactured in Florida in 1914 was $81,112,000.00; in 1925 it was $267,009,000.00, an increase of 229 per cent.

The carload movement by rail, via all lines, of fruits and vegetables from the State of Florida for the season 1914-1915 was 40,563 cars, while for the season 1923-1924 it had grown to 105,483 cars; in 1924-1925 it was 95,110 cars, and in 1925-1926 it was 76,070 cars.

The average for the first five years, including 1914 was 42,079 carloads, while for the last five years, including 1926, it was 85,870 carloads, or an increase of 104 per cent.

At page 225 of the Record, Mr. Edwards testified in substance that the market or exchange value of the Atlanta, Birmingham & Coast Railroad Company on December 31, 1926, or January 1, 1927, was in excess of the amount which it is seeking to set upon its books as the value of the property.

At this point he testified in substance that the Atlantic Coast Line Railroad Company would have been justified in expending "the usual cost of such a railroad; I suppose it would have been about $40,000,000.00" to have reproduced it.

At page 226 he testified that the Atlantic Coast Line would have been justified in expending $40,000,000.00 to produce a line between Waycross and Birmingham, and Atlanta and Thomasville, and in basing that opinion he says:

> "By reason of the fact that there was a very patent gap of their railroad system between Florida, where such a large fraction of their tonnage was produced or consumed, and those important lines which came down to Atlanta and to some extent to Birmingham."

We have seen that in its order of valuation—Valuation Docket No. 1—the Commission stated:

> "It is the fair value of the property which the carrier holds for and uses in the service of transportation and upon which it is entitled to earn a fair return." (75 I. C. C. 645, 666).

There is no doubt about the carrier being entitled to earn a fair return upon the valuation of its road and equipment.

We have also seen that under the Act to Regulate Commerce "All final valuations by the Commission . . . shall be *prima facie* evidence of the value of the property in all

proceedings under the Act to Regulate Commerce as of the date of the fixing thereof."

This is made to apply to all judicial proceedings for the enforcement of the Act and in all proceedings brought to enjoin, set aside, annul, or suspend in whole or in part, any order of the Interstate Commerce Commission.

We have seen that the court has held that the proceeding now at hand and the judicial proceeding then at hand are proceedings under the Act to Regulate Commerce within the meaning of Section 19a, 5(i) of the Act.

We accept the assurance of the Commission that its report in Valuation Docket No. 1 was "based upon a careful consideration of all the relevant facts," etc. We also accept the further statement that the valuation "is the fair value of the property," etc.; notwithstanding the statements made by Mr. Willoughby and Colonel Bugg that the valuation was too low.

We assert with confidence that a valuation of this property on January 1, 1927, would have been in excess of the valuation of it on June 30, 1914. This assertion is based on the following facts:

1. Common knowledge of the change in conditions during that period;
2. Increase in the population in the territory covered by Atlanta, Birmingham & Coast Railroad Company;
3. Increase in gross revenue to the extent of 94.4 per cent;
4. Increase in railway operating income to extent of 36.1 per cent;

5. Increase in assessed values of properties in Alabama and Georgia, in which States the property of this Company lies;

6. The great increase in the strategic value of this property in its relation to the Atlantic Coast Line Railroad Company and its allied lines;

7. The tremendous increase in the traffic of Atlantic Coast Line Railroad Company and its allied lines which gross revenue from that traffic had become for the year 1926 $308,000,000.00. (R. 268).

It cannot be claimed that the valuation of $24,010,135.47 represents the cost of the property. It is practically $40,000,000.00 less than the cost of those properties reported to the Commission year in and year out for a good many years. It is only about one-half of the reproduction cost in 1927.

We respectfully submit that the *prima facie* effect which the law gives to the Commission's findings on valuation should be made conclusive as to the valuation of this property on January 1, 1927, for that the valuation as of June 30, 1914, had been fairly found after diligent effort and circumstances which made for value as of January 1, 1927, as compared with June 30, 1914, were such as greatly to increase the 1927 valuation. The ratio, as we have seen from the evidence, to be applied on January 1, 1927, to the elements which were valued on June 30, 1914, should be 1.85, which makes about $40,000,000.00, and of that $40,000,000.00 the Atlanta, Birmingham & Coast Railroad Company seeks to use for this purpose only about $24,000,000.00. That is, it seeks to write off all of the increased percentage in the valuation of the units. Instead of using 1.85 in its application to the units it seeks to use only the figure 1. That is, to multiply the values

of 1914 by 1 instead of by 1.85 (of course, adding thereto the net of additions, betterments and abandonments).

HISTORY AND EARNINGS.

The next subject for consideration is the history and earnings of the property acquired by the Atlanta, Birmingham & Coast Railroad Company.

The Atlanta, Birmingham & Atlantic Railway Company was organized for the purpose of establishing a line of railroad from Brunswick, Georgia, to Atlanta, Georgia, and Birmingham, Alabama, and to establish a line of steamers from Brunswick to New York and Boston (75 I. C. C. 645). The property south of Montezuma, Georgia, was made up of several small roads which were linked up piece by piece, and additions were made thereto. Colonel Bugg described this at Record page 241, et seq. The description of the properties has been given in the Record and also in Valuation Docket No. 1, 75 I. C. C. 645. Colonel Bugg gave a schedule of the earnings as follows:

1907—Net Operating Revenue.....	$416,697.00
1908— " " "	426,662.00
(A year of financial stringency)	
1909—Net Operating Revenue.....	357,026.00
1910— " " "	579,389.00
1911— " " "	662,592.00
1912— " " "	676,825.00
1913— " " "	566,301.00
1914— " " "	632,406.00
(The World War began in August, 1914)	

1915—Net Operating Revenue..... 282,371.00

1916—(Year ending June 30) Net Operating Revenue 597,527.00

1916—(Year ending December 31) Net Operating Revenue..... 784,658.00

1917—Net Operating Revenue..... 661,111.00

1918—*Deficit* 335,074.00
(Taken over by Government Jan. 1, 1918)

1919—World War, Government Operation *Deficit* 780,080.00

1920—Two Months' Federal Administration, Six Months' Federal Guarantee, Four Months' Corporate Operation .....*Deficit*—1,096,228.00

1921—Corporate Operation under conditions established by Federal Operation .....*Deficit*—1,579,450.00

1922—Receiver's Operation....*Deficit*— 213,905.00

1923—Net Operating Revenue..... 70,048.00

1924— " " " 421,371.00

1925— " " " 420,022.00

1926— " " " 520,438.00

(See Record, pages 252, 253.)

At Record, page 253, the witness Bugg said:

"Those figures are illuminating, in that they indicate that in each case following a financial stringency or an outbreak of war, or the results of the operation of the Railroad Administration, that the road recovered its

earning power and continued to show improvement until some of these tragic events hit it again."

There was a strike which was extensive and devastating to this property during the year 1921 (R. 231).

The apex of the earnings of the property up to January 1, 1927, was the year 1926 (R. 230). The strike above referred to cost more than the net deficit which had accrued to this property from the beginning.

The year of the purchase of this property by the Atlantic Coast Line the net operating income was $520,438, as above referred to.

The earnings of this property were "sharply upward" (117 I. C. C. 189). This had been the trend for two years.

This property did not have sufficient local traffic to support it. It was, and is, a "bridge line." The connection of this property with Atlantic Coast Line and its affiliated roads supplied the deficiency which existed in it. That is, it made a use for it. In addition to that it gave to the Atlantic Coast Line and its system a solidarity which was so essential to it as to be called by his Commission the first step in its re-creation. After the Atlantic Coast Line acquired the common stock of the Atlanta, Birmingham & Coast Company, it was no longer at the mercy of its competitors nor dependent upon any other line for the completion of its transportation system between Florida and the west and between the west and Florida.

STRATEGIC VALUE.

The Interstate Commerce Commission, in Docket 12964, Consolidation of Railroads, 63 I. C. C. 455, at page 543,

states: *"Despite its history, a very considerable value attaches to the A. B. & C. Railway. This arises from its relation to the largest systems round about, namely the A. C. L. and the L. & N."*

This property was there grouped with the Atlantic Coast Line—Louisville & Nashville System. It was retained in that group in the Commission's final plan of consolidation (159 I. C. C. 522, 524).

The witness Edwards identified two maps (R. 218). These are Exhibits Nos. 11 and 12. Exhibit No. 11 shows the lines of the Atlantic Coast Line System, including therein lines in which the Atlantic Coast Line or any one of its subsidiaries control as much as one-half of the voting stock. These lines begin on the north at Chicago and include, besides, such places as St. Louis, Evansville, Louisville, Indianapolis and Cincinnati, and on the northwest Memphis, Knoxville and Nashville. On the northeast the lines begin at Richmond and Norfolk, follow the Atlantic Coast and ramify through the State of Florida. The Louisville & Nashville and the Nashville, Chattanooga & St. Louis Railway get to Atlanta from the northwest. From Atlanta the Georgia Railroad, which is operated by the Atlantic Coast Line and the Louisville & Nashville as lessees, goes to Augusta, Macon and Athens.

The Atlantic Coast Line's system had no lines in Georgia between Atlanta and Waycross, nor had that system any line between Atlanta and Birmingham. Waycross is about forty miles north of the Georgia-Florida line. (It has a line as far north as Albany, Georgia, which is about two hundred miles from Atlanta. That line in connection with the Central of Georgia was on January 1, 1927, used by the Atlantic Coast

Line for all of its passenger service and much of its freight from Florida to Atlanta and beyond, and is now so used.) This line is controlled by the Illinois Central.

Exhibit No. 12 shows how the lines of the Atlanta, Birmingham & Coast Railroad Company bridge the gap between Waycross and Atlanta, giving to the system complete connection and bringing the two great wings of the Coast Line's system together.

In the first report on Consolidation, 63 I. C. C. at 543, the Commission, in speaking of the Louisville & Nashville and Atlantic Coast Line Railroads, said:

> "At one point, however, it is markedly weak, due probably, to the independent development of its two great wings, eastern and western. This defect is the lack of connection affording through routes between north and south across the whole of middle Georgia between Atlanta and Waycross. *The first point concerning its re-creation is the bridging of this gap.*" (Italics added.)

That report is dated September 12, 1921. The tentative plan adopts as an appendix the report of the Commission by Dr. William C. Ripley. Thus, the Commission has itself placed the bridging of the gap between the two great wings of this system as the first step in its re-creating. We will see that the Commission's statement that the bridging of this gap is essential to the "re-creation of this system" is correct.

The system contains about 14,500 miles. In Florida the Atlantic Coast Line has 2,100 miles, in Georgia about 700. The lines in Florida develop traffic of a highly perishable nature, consisting of vegetables, citrus fruits and things of that sort, which require rapid movement. The points on the

northwest border of this system, to-wit: St. Louis, Evansville, Louisville, Cincinnati and Chicago, are gateways to a very great and profitable part of the country.

In 1926 the gross revenues from this system were $308,000,000 (R. 268). Let us bear in mind that the undisputed evidence as to the cost of reproduction of the property of the Atlanta, Birmingham & Coast in 1927 is that the cost would have been about $47,000,000.

The witness Edwards testified (R. 225) as follows:

> "I have shown by another map that the Atlanta, Birmingham & Atlantic bridged the gap exactly." (He means Exhibit No. 12.) "It became, or was capable of becoming, the link connecting these two parts of the Atlantic Coast Line System. I have shown that the Atlanta, Birmingham & Atlantic was a line between important traffic territories, traffic producing territory and traffic consuming territory, considerably shorter than the existing lines of the Atlantic Coast Line. I agree with the testimony of Mr. Willoughby that if the Atlanta, Birmingham & Atlantic had not been built, in my opinion the Atlantic Coast Line should have built a road substantially located geographically where the Atlanta, Birmingham & Atlantic is located."

At page 229 the witness testified as follows:

> "Q. Examiner Walton: Do you want to be understood in saying that the Atlantic Coast Line would have been justified in spending as much as $40,000,000 on January 1, 1927, in order to effect the saving of mileage from Waycross to Atlanta and Thomasville to Montgomery, mentioned in your direct testimony?"
>
> "A. No, that is only a part of it, Mr. Examiner, my opinion—and only my opinion, of course—is that this

was a great big system of railroads, one of the largest in the United States, taking all of it together. One of its principal fields for producing traffic is in the State of Florida. A large part of that traffic moves to and from the west, meaning the Ohio River territory. This system, as I have explained, had a gap between the Florida line, almost, Waycross, and Atlanta. For the protection of their future, for the service, it is my opinion that they were justified in spending as much as $40,000,000 to build the railroad to take care of that hiatus."

"Q. Examiner Walton: How would you have expected the Atlantic Coast Line to get an adequate return on $40,000,000 of expenditure?"

"A. Mr. Examiner, the total traffic involved was very large. Of course, I do not know just how much there is between Florida and the West, but the total earnings of this system ran around $300,000,000 a year and for the consolidation of two of the principal parts of the system it seems to me only a small sum of money to spend $40,000,000 as a matter of protection as well as a matter of revenue (R. 229).

The witness Bugg testified that the gross revenue of this system for 1926 was $308,000,000 (R. 268).

At page 185 Mr. Willoughby expresses his agreement with the Commission as to the value of this property growing out of its relation to the Atlantic Coast Line and the Louisville & Nashville.

Mr. Willoughby also expresses his agreement with the Commission (R. 185, 186), stated in its report of October 26, 1926, 117 I. C. C. 181 and 186, a part of which quotation is as follows:

"It has long been recognized the lines of the A. B. & A. would be of particular value to the system of the Atlantic Coast Line in affording north and south connections between the lines of that system and those of its affiliated companies."

He further testified the lines there referred to are those now owned by the Atlanta, Birmingham & Coast. At page 186, et seq. he gives some description of the physical relation between this property and the properties of the Atlantic Coast Line Railroad Company and the Louisville & Nashville. It connects with the Louisville & Nashville Railroad at Birmingham and at Atlanta, operating into the same passenger station at Birmingham. It touches the Louisville & Nashville at Pelham, which is some twenty miles from Birmingham. It touches the Nashville, Chattanooga & St. Louis at Atlanta. This latter company is controlled by the Louisville & Nashville. It touches the Atlantic Coast Line at Brunswick, Offerman, Waycross and Tifton, Georgia. The Atlantic Coast Line has about 5,200 miles, the Nashville, Chattanooga & St. Louis about 800 miles, the Louisville & Nashville about 5,200 miles, the Georgia main line 175 miles; that road proceeds to Athens and other places in Georgia. The Atlanta & West Point and the Western Railway of Alabama have about 170 miles. Other roads, such as the Charleston & Western Carolina, with 350 miles, are in the system. At page 187 he testified:

"Q. State whether or not in your judgment, from the economic side of your engineering profession, those facts give to this property an important value because of its affiliation with those other properties mentioned."

"A. I think so."

Colonel Bugg gives testimony on this subject, beginning at R. 238. He testifies that the location of the Atlanta, Birmingham & Coast Company's property adds a great deal to its value, saying that the Interstate Commerce Commission so expressed itself in 63 I. C. C. He concurs in that opinion. He shows the relation between the Atlantic Coast Line and the Louisville & Nashville, and shows the points of contact between this property and the lines of the Louisville & Nashville and the Atlantic Coast Line, and that it makes a very direct connection with Florida traffic, saying "traffic brought up from Florida over the Atlantic Coast Line is delivered to the Atlanta, Birmingham & Coast at Waycross (or Offerman) and can be handled to Atlanta, where the Atlanta, Birmingham & Coast connects with the Louisville & Nashville and the Nashville, Chattanooga & St. Louis. The Atlanta, Birmingham & Coast can also handle such traffic to Birmingham, Alabama (R. 239). He shows the relation between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that is, that the Louisville & Nashville owns the controlling stock of the Nashville, Chattanooga & St. Louis. He testifies that the relation of the Atlanta, Birmingham & Coast properties to the Atlantic Coast Line, Louisville & Nashville, and Nashville, Chattanooga & St. Louis "contributes very greatly to its value" (R. 239), and adds, "It is in the power of the Atlantic Coast Line Railroad Company to give to the Atlanta, Birmingham & Coast Railway a great deal of unrouted and western bound traffic which the Atlantic Coast Line originates in Florida and South Georgia, and to influence shippers to so route even a greater proportion. The Atlantic Coast Line has about 2,100 miles in Florida and handles more of the perishable traffic out of Florida than perhaps any other line. In

addition to that which it originates, the Atlantic Coast Line receives a great deal of traffic brought into Jacksonville by the Florida East Coast. The Florida East Coast now has about 900 miles of line, going down to the very tip of the peninsula and Key West."

> "At Atlanta the Atlanta, Birmingham & Coast touches both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, both of which serve the west. It can be fed at its northern termini, Waycross, Offerman, Brunswick and Tifton, by the Atlantic Coast Line. Just as it can be fed by those roads at those points of interchange it can be used as an instrument for the transfer of traffic to them" (R. 240).

He testifies that this makes the Atlanta, Birmingham & Coast property a bridge line and gives to it "a great deal of value."

At R. 240 he states that he heartily agrees with Mr. Willoughby's testimony that the property, if not in existence, should be built, reserving the right to differently locate at certain parts of the line.

At R. 267 Colonel Bugg testified as follows:

> "Q. Please state if there was a special value in this property to the Atlantic Coast Line System at January 1, 1927, and, if so, describe that."
>
> "A. It had two kinds of value to that system in 1927. The year 1926 was a year of the heaviest railroad gross earnings known in the southeastern part of the country, and probably in any other part of the United States. Possession of this property by the Atlantic Coast Line could contribute to the holdings on the lines of the Atlantic Coast Line and its affiliated lines very valuable traffic connections long in existence. If those traffic connections were broken for any cause, the Atlantic Coast

Line, after the purchase, had the Atlanta, Birmingham & Coast Railroad to fill in those broken connections for its traffic out of and into Florida, both freight and passenger.

"The Atlantic Coast Line had then and has now about 2,100 miles of line in Florida and works in close co-operation with the Florida East Coast Railway, which has about 900 miles of line in that State. If the Atlantic Coast Line should be without the control of the Atlanta, Birmingham & Coast, the great volume of the traffic out of that territory toward the west, then handled by the Atlantic Coast Line, would have been at the mercy of circumstances beyond its control. That should have been cured as quickly as possible. The control of the Atlanta, Birmingham & Coast does effectively cure it."

"Q. What was the gross revenue of the Atlantic Coast Line Railroad and the combined gross revenue of the Atlantic Coast Line System, including the Atlantic Coast Line property in 1926?"

"A. The gross revenue of the Atlantic Coast Line Railroad was about $96,000,000, and of the combined Atlantic Coast Line properties about $308,000,000."

"Q. Was it in the power of the Atlantic Coast Line Railroad and its affiliates to control or influence valuable traffic to the Atlanta, Birmingham & Coast on January 1, 1927?"

"A. Yes, sir, in my opinion, they could have controlled or influenced to the Atlanta, Birmingham & Coast traffic sufficient to have made the net income of the Atlanta, Birmingham & Coast 5¾ per cent. on more than the valuation now sought."

"Q. Colonel Bugg, on yesterday the Examiner, as I recollect, asked you in substance if there had been any change in the interchange of traffic between the Atlantic

Coast Line and the Atlanta, Birmingham & Coast, and I do not remember your answer. Will you please say?"

"A. The question, as I recall it, related to the change in volume or proportion, and my answer was that while there had been a change in volume, due to a general decrease of business, that I did not think there had been any material change in the proposition."

"Q. Why, in your judgment, has that been so, that there has been no increase in traffic to the Atlanta, Birmingham & Coast?"

"A. *Because, in my opinion, traffic relations of greater value have been preserved to the Atlantic Coast Line Railroad and its affiliated roads by the course pursued.*" (R. 268).

There is not a scintilla of evidence in this Record contrary to the testimony of Mr. Willoughby, Mr. Edwards, or Colonel Bugg on the strategic importance of this property. On the other hand, there is confirmation thereof by the Commission, as expressed in the two instances quoted and also in the tentative and final grouping of railroads for purposes of consolidation.

Further, as is elsewhere pointed out in this brief, the only witness offered by the Commission definitely confirms the strategic value of the Atlanta, Birmingham & Coast Company's properties to the Atlantic Coast Line's system. As we will show in the discussion of Mr. Boles' testimony, he states that the possession of the control of the Atlanta, Birmingham & Coast's properties by Atlantic Coast Line may very well save to the Atlantic Coast Line a large sum of money by preserving to it traffic then moving over its lines.

Colonel Bugg's testimony is to the effect that the Atlantic Coast Line Railroad Company can divert to the Atlanta, Birmingham & Coast Railroad Company enough traffic to make the net return on that road 5¾ per cent. on more than the valuation which the Atlanta, Birmingham & Coast Company desires to set up in this proceeding as the value of its investment in road and equipment. This element of valuation the Commission's witness Boles entirely eliminates in his estimate.

We respectfully submit that the Atlanta, Birmingham & Coast Railroad Company is modestly within its rights in undertaking to set up on its books the value of its road and equipment at $24,010,135.47, only about one-half of its cost of reproduction, which is the value affirmed to it by this Commission in Valuation Docket No. 1, adjusted to additions, betterments and abandonments, and that when the strategic value of this property to the roads controlled by the Atlantic Coast Line is taken into consideration to the extent and in the manner affirmed by the Commission, which makes it the first step to the "re-creation" of that system, the value claimed by the Atlantic Coast Line is modest to the last degree.

EVIDENCE OF MR. C. E. BOLES.

The Commission introduced one witness, Mr. C. E. Boles (R. 276). He is a member of the Bar and is in the employ of the Commission, with the Bureau of Finance. Since September 1, 1926, he has been in charge of the Securities Section of the Bureau of Finance, having immediate supervision of the work of examiners who handle applications by carriers for authority to issue securities (R. 277). He has never seen the properties of the Atlanta, Birmingham & Coast Railroad

Company (R. 300). He "did not consider any of the value of any of the physical properties of the carrier, that is, separately and apart and as separate items" (R. 300, et seq.). He considered only the Commission's valuation of the properties as stated in its final valuation. He gave no consideration to the great increase in values in 1927 over 1914. He did not attempt to give any opinion as to the value of the properties for rate making purposes. He undertook to place a value on the properties "as evidenced by the securities for exchange purposes only" (R. 300). He "did not reach any conclusion as to the value of the physical property of Atlanta, Birmingham & Coast" (R. 300)—neither lands, nor rails, nor equipment, nor physical property of any kind. He is not an engineer. He gave no consideration to the reproduction cost except as stated in the Commission's final valuation of 1914 (R. 301). He admitted that in the issuance of securities by railroads the value of the properties back of those securities is an element to be taken into consideration (R. 301). He considered that only as he considered the valuation as fixed by the Commission, without any attention to the values of 1927 as to the physical properties (R. 301). His whole opinion is based on the record of the proceedings in Dockets Nos. 5454 and 5470 (117 I. C. C. 181, 439; 158 I. C. C. 6). He has taken into consideration, therefore, none of the matters and things developed at the hearing in Docket No. 25170 (201 I. C. C. 401, the present case). That is, he had before him none of the evidence given by the witnesses Edwards, Willoughby, Bugg and Bell, to which reference has been herein made. He has taken no account whatever of the difference in valuations in 1927 as compared with 1914 (R. 300). He determined the value of the property was not more than

$9,395,075 (R. 283, 301). He admitted (R. 280, 281) that prospective earnings of a property are always to be considered in granting certificates by the Interstate Commerce Commission. Mr. Boles simply announces that the Atlantic Coast Line could have bought this property for $9,395,075 in cash (R. 288). Apparently this is based on the use of the par value of the preferred stock plus the amount paid out by Atlantic Coast Line for the prior debts, taking into consideration its acquisition of 384 shares of preferred stock (R. 288, 301), and eliminating the valuation by the Commission as of June 30, 1914, and every other element of value. In other words, Mr. Boles does just exactly what the District Court said should not be done. He undertakes to put what he considers to be the cost of this property as the measure of the rights under Accounting Rule No. 41, and under the decision of the court in *Atlanta, Birmingham & Coast Railroad Company v. United States,* 28 Fed. (2d) 885, it was held that value and not cost should determine the entries as to investment in road and equipment. The court also determined that:

> "We do not think this valuation is fixed either by the value of 1914 made by the Commission, or what the Coast Line Company was willing to pay and assume, though both may be matters immediately to be considered in making a fair valuation."

He then proceeds to show that such consideration as he gave to that valuation was perfunctory. He did not consider the values of 1927 as to physical property. He did not consider any of the values of any of the physical property of the carrier separately and apart, as separate items. He did not reach any conclusion as to the value of the physical property of the Atlanta, Birmingham & Coast. Such consideration

as Mr. Boles gave to the valuation fixed by the Commission was on some theory not disclosed which amounted to no purpose whatsoever. He makes this admission (R. 293):

> "The line was needed to round out the system of the Atlantic Coast Line, particularly for traffic between Florida and Atlanta and points beyond. The Atlantic Coast Line had its lines to the west and northwest in connection with its affiliated lines through Montgomery and through Spartanburg. The line of the Atlanta, Birmingham & Atlantic afforded a more direct route and a more economical route for part of the traffic that could be handled over these other lines. The Seaboard Air Line had announced its plan of connecting up its Florida lines with Atlanta. *The Atlantic Coast Line must acquire the Atlanta, Birmingham & Atlantic or otherwise provide a more direct route from Florida to Atlanta, to preserve its competitive status with the Seaboard Air Line.*" (R. 293; italics added).

Mr. Boles then makes this statement:

> "*Another inducement for acquiring control of the properties was the possibility of holding to its own lines all traffic to and from points served by the Atlanta, Birmingham & Atlantic from and to points reached by the Atlantic Coast Line and its affiliated lines, and competitive territory beyond those points.*" (R. 293).

That statement is correct. He emphasizes that in his next statement:

> "*Losses of the Atlanta, Birmingham & Atlantic in handling traffic might well be more than made up in operating savings and in profits to the Atlantic Coast Line and its other affiliated lines, or even by the Atlantic Coast*

Line holding to its system lines the traffic it then had, especially in face of improved service of its rival systems, the Southern and the Seaboard Air Line." (R. 293).

That statement is correct and is important. He leaves out, however, other lines not mentioned in his testimony which could be turned into a competitive system. It does not fully express the poverty of the Atlantic Coast Line as to its traffic moving from Florida to the West through Atlanta. Without the Atlanta, Birmingham & Coast Railroad Company, the Atlantic Coast Line's system was at the mercy of other carriers, not only as to service, exchanges, and competition, but also as to divisions. Its two great wings were disconnected and a system of 14,500 miles of road was incomplete.

This part of his evidence should be read in connection with Colonel Bugg's testimony beginning at page 267 and running through page 269 of the Record, set out elsewhere in this brief. It shows that if the Atlantic Coast Line should be without the control of the Atlanta, Birmingham & Coast, a great volume of traffic out of the Florida territory towards the west, then handled by the Atlantic Coast Line, would be at the mercy of circumstances beyond its control; and that this was effectively removed by the ownership of the controlling stock of the Atlanta, Birmingham & Coast Railroad Company.

Colonel Bugg then testified that it was within the power of Atlantic Coast Line to have influenced to the Atlanta, Birmingham & Coast Company traffic sufficient to have made the net income of that property 5¾ per cent. on more than the valuation sought in this case. He also testified that the Atlantic Coast Line had not made this diversion of traffic to Atlanta, Birmingham & Coast Railroad Company, because in his opin-

ion, "traffic relations of greater value have been preserved to the Atlantic Coast Line Railroad and its affiliated roads by the course pursued." This testimony is to the effect that the traffic relations which had been preserved had a value not *equal* to 5¾ per cent. upon the valuation now sought for the Atlanta, Birmingham & Coast property, but a return on a value greater than that sought here.

Turn back now to page 293 of the Record where the witness Boles admits:

> "Losses of the Atlanta, Birmingham & Atlantic in handling traffic might well be more than made up in operating savings and in profits to the Atlantic Coast Line and its other affiliated lines, or even by the Atlantic Coast Line holding to its system lines the traffic it then had," etc.

Notice that Colonel Bugg's testimony and Mr. Boles' testimony in this case come to the same point, except that Colonel Bugg carries his statement as to the value of the Atlanta, Birmingham & Coast Railroad Company's property to the Atlantic Coast Line Railroad Company to a more definite conclusion than does Mr. Boles. The difference between these two witnesses is that Mr. Boles recognizes the existence of the element of value in this property, but refuses to give it effect. He refuses to give effect to the physical value of the property, for he has taken no account whatever of its mileage, its track, its terminals, its bridges, its gradings, its ballasts, its buildings, or its equipment. He has, in effect, given no consideration whatsoever to the valuation placed upon the property by the Commission as of June 30, 1914. He has given consideration to only one of many elements which must be considered, and that is, what the Atlantic Coast Line paid

the purchasing committee (Roosevelt and Fowler) to enable them to deliver the property to the Atlanta, Birmingham & Coast Railroad Company free of liens.

To eliminate the element of value which brought about the transaction and which made this property attractive and necessary to the Atlantic Coast Line's system is just as wrong and unfair as it is to eliminate the value of the physical properties. It is as though this witness had undertaken to value a bar of gold, and in doing so, had eliminated the quality of the metal. This element of value to the Atlantic Coast Line's system which he refuses to value is that which this Commission has said is the first step in the re-creation of the Atlantic Coast Line's system.

His evidence concedes the need of this property to the Atlantic Coast Line's system, and then fails to value that need, and fails to consider a reproduction cost for this property thus acquired by the Atlanta, Birmingham & Coast Railroad Company. He realizes that this property had a value to the Coast Line in holding to its system's lines "the traffic it then had" (R. 293); but he gives no value to this. Yet, it is one of the great elements of value possessed by the property.

At Record 296 Mr. Boles says:

> "The record seems clear that the consideration given by the Atlanta, Birmingham & Coast for the properties consisted of the preferred stock and the cash paid on its behalf by the Atlantic Coast Line."

He then adds:

> "The Atlanta, Birmingham & Coast did not issue its common stock in part consideration of the properties, nor did it receive any part of the properties in consideration

of the issue of its common stock to the Atlantic Coast Line."

The difficulty about that is, it is incorrect as a matter of fact under the Record in Dockets Nos. 5454 and 5470, on which he appears to have relied. It is much more certainly and clearly incorrect under the evidence adduced in this case. It has been ascertained by the United States District Court for the Northern District of Georgia on two occasions to be incorrect. After the first decision by that court, hereinbefore referred to and reported in 28 Fed. (2d) 885, the Commission appeared to proceed as though that finding was to be given no effect; and the court in the second case hereinbefore referred to and reported in 37 Fed. (2d) 401 adhered to and reaffirmed its original opinion.

This evidence on the part of Mr. Boles shows on what impossible theories his conclusions are based.

The Atlantic Coast Line did not provide, as he testified at Record 296, to the New Company the cash to pay off the claims against this property. It was provided to the *purchasers who received or were entitled to receive the* 150,000 *shares of common stock in consideration* (*with the preferred stock*) *of their conveyance of this property to the New Company.*

Mr. Boles' proposed valuation of $9,395,075 is to be compared with Colonel Bugg's valuation of the terminal properties only of the Atlanta, Birmingham & Coast Railroad Company. He values those at $6,000,000 to $8,000,000.

THE COMMISSION'S FINDING OF VALUE.

This is found at R. 60 and is as follows:

"We find that the *market or fair cash value* of the properties in question did not exceed the sum of $9,428,713.76." (201 I. C. C. 645, at 671; Italics added).

This finding is, of necessity, erroneous. It eliminates the following elements of value:

(1) Value for rate-making purposes;

(2) Cost of reproduction;

(3) The property's strategic value;

(4) Its relations to the Atlantic Coast Line and the Louisville & Nashville's Systems.

We assert that neither the "market" nor "fair cash" value of a property can be ascertained if any one of the above-mentioned elements is overlooked. Let us analyze this:

Value for rate-making purposes: The basis of all calculations as to the reasonableness of rates to be charged by a common carrier by railroad "must be the fair value of the property being used by it for the convenience of the public." This required a consideration of at least the following items: The length of mileage; cost of right-of-way; the terminals; number of bridges and their cost; the rails, their weight, how they are laid and their cost; the cross-ties and the laying of them; the grading of the right-of-way; the construction and necessary buildings; labor to be used in the construction; and many other items. But the ones which have here been mentioned must, of necessity, be taken into consideration in ascertaining the value of a railroad property; yet no one of those items has been considered by the Commission in determining the value of the property in this case.

Reproduction cost: The property which was to be valued in this case was not new. The books of account did not have a record of the entire cost. The south end of the property was assembled in several units of railroads already constructed. This element should certainly have been taken into consideration in this case. It was three times sworn, once by Mr. Willoughby, then by Colonel Bugg and then by Mr. Edwards, that if the Atlanta, Birmingham and Coast Railroad had not been built it should now be built. It is difficult to see how any attempt could have been made to ascertain the value of this property without considering the cost of reproduction.

Strategic value: No sort of allowance is made by the Commission for this element of value in this case, although the Interstate Commission (63 I. C. C. 455), at 543 had stated that the property in its opinion had "a very considerable value" because of its relations to the larger systems round about, particularly the Atlantic Coast Line Railroad and the Louisville and Nashville Railroad. The fact that this property was needed by the Atlantic Coast Line and the Louisville and Nashville to round out their systems has been noted by the Commission, and yet this important element of value to this property was eliminated by the Commission in its report now under consideration.

The "market" or "fair cash" value of a property is not a detached thing. There is no such thing as a "market" value for railroads taken as a whole as this was. There is no market place for railroads. The "fair cash" value can not be measured in a detached way. One can discard no relevant element in ascertaining the value of a railroad property.

We quote from a dissent in the case of *Southwestern Telephone Company v. Public Service Commission*, 262 U. S. 276, at 292 (the dissent is written by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes):

> "It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market."

This property was in reality earning a substantial return upon the value sought to be set up in this case. It was, according to the evidence, preserving to the Atlantic Coast Line Railroad Company traffic which was of greater value to it than having the traffic transported over the lines of the Atlanta, Birmingham and Coast although the earnings from such traffic would have been sufficient to have made 5¾ per cent. return upon the value of this latter company.

The Course Pursued by the Commission Will Produce an Impractical Result.

In the first place the value to be entered upon the books of Atlanta, Birmingham and Coast Railroad Company in accordance with the Commission's report and order of July 9, 1934 (201 I. C. C. 645) will be only what the Commission calls the "market or fair cash value" of the property as of January 1, 1927. It is not intended to be, as has been pointed out, the rate-making value. The Commission's valuation is one which can be of no good to anybody but which can be of harm to everybody connected with the ownership of this property.

The results of the valuation proposed by the Commission will not stand analysis. The Commission's course will pro-

duce a value of the property at the sum of $9,428,713.76 as of January 1, 1927. That means a valuation of every species of property owned by the Company whatever it may be and wheresoever situated. Let us analyze this:

The current assets of the Company as of January 1, 1927, were $2,268,817.73 (R. 213). In our efforts to find the value of the road and equipment let us subtract that sum from the $9,428,713.76. The result is $6,729,896.03. This figure will represent the alleged value of road and equipment. The equipment is valued as of January 1, 1927 (Exhibit 9, R. 193, 210, 223) at $2,999,776.05. This figure is referred to in the evidence as being $3,000,000. We will subtract that $3,000,000 from the $6,729,896.03 representing road and equipment as above stated. That means that the road itself is to be valued at $3,729,896.03. This road is described to some extent by the Witness Bugg at record pages 235, 241 and 267.

It has 640 miles of main line, it has terminals in the cities of Atlanta, Georgia, Birmingham, Alabama, and Brunswick, Georgia. Each of these terminals is of substantial value. The terminals at Atlanta and Birmingham were valued by Colonel Bugg as of January 1, 1927, at $6,000,000 or $8,000,000 (R. 267). These terminals taken at the smaller of those two valuations—$6,000,000—are worth about 160 per cent. of the amount above set out which is left for the road. That will leave less than nothing for the 640 miles of main line and the Brunswick terminal. Colonel Bugg made some itemization of the cost of some of the important items involved in this road at R. 267. He testified that the steel and concrete bridge alone, at 1927 prices, were worth $2,166,378;

the cross ties in the track at current 1927 prices were worth 2,852,348;

the rail, at relay and second hand price, with suitable allowance for scrap and scrap prices was worth 2,016,524;

the carrier land alone, exclusive of Atlanta and Birmingham, at normal values of January 1, 1927, was worth 1,779,709

That means that there is no worth given to these items which were in place in this railroad on January 1, 1927, and which had a value of $8,814,959 besides the under-valuation of the other items referred to above.

It must be taken into consideration that the year 1926 was the year of the heaviest railroad earnings which the Southeastern States ever had and probably which this country ever had. The Atlantic Coast Line's gross revenues for that year were about $96,000,000 and the gross revenues of the Coast Line and its affiliated properties were about $308,000,000. (R. 268). It was within the power of the Atlantic Coast Line and its affiliates to control or influence traffic to the Atlanta, Birmingham and Coast Railroad Company on January 1, 1927, which Colonel Bugg states, would have been sufficient to have made the net income of the Atlanta, Birmingham and Coast Railroad Company 5¾ per cent. on more than the valuation now sought for its property—$24,010,135.47.

There should be no serious effort to have such an impractical and unjust result perpetuated in the law.

DISCUSSION OF THE LAW

We have argued in the foregoing part of this brief that the Commission in providing for the valuation of this property dealt with only its "market" or "fair cash" value, and that it recognized the difference between that value and a value for rate-making purposes; and that the Commission omitted other elements which certainly should have been taken into consideration in ascertaining the value of this property, including reproduction cost, its strategic value including the need of the Atlantic Coast Line and the Louisville and Nashville Systems.

We submit that the value of this property is not correctly stated. The value is fixed for accounting purposes. The fact that the report is so limited has been hereinbefore discussed. This requires us to take note of the purpose of accounts for railroad purposes.

The Purpose of Accounts.

In *Kansas City Southern Railway Co. v. United States*, 231 U. S. 423, Justice Pitney, at page 440 of the opinion, states:

> "The very object of a system of accounts is to display the pertinent financial operations of the company and throw light upon its present condition. If they are to properly do this, the form must correspond with the substance."

A system of accounts should as far as possible reflect information useful and usable for the following purposes:

(1) *Fair returns.*

It is contemplated by Section 15a, subsection 2 of the Interstate Commerce Act that the carrier shall have a fair return

upon the aggregate value of its railroad property. It is apparent that books kept in accordance with the order of the Commission here involved will be worse than useless as to this.

(2) *Evidential value of books.*

Subsection 5(i) of Section 19a contemplates that the property investment account of the carrier shall have evidential value. If the Commission's order here involved prevails, that evidential value will be inconsistent with the facts, will contribute to injustice, and will be contrary to this section of the Interstate Commerce Act.

(3) *Credit standing.*

The carrier's accounts should properly reflect its condition so as to enable it to procure for itself its best credit standing. The books of the Atlanta, Birmingham & Coast Railroad Company, kept according to the Commission's order, will not be helpful to credit standing, but will be destructive of it.

(4) *Taxation.*

The books of the carrier should reflect the value of its property which is considered in determining the amount of the taxes it pays or any other method to which value is material. Appellant's books, if kept pursuant to the Commission's order, would produce results unjust both to the carrier and to the public in such matters of taxation.

(5) *Stockholders.*

The condition of the books should properly reflect the status of the carrier to its stockholders. In this case, should the Commission's figures as ordered be entered in Appellant's books, this purpose would be defeated.

(6) *Property investment.*

The property investment account of the carrier should be of great value to it, especially so when kept consistently with the provisions of Section 19a of the Act.

The *Kansas City Southern Railway* case, supra, evidently contemplates that this account is to be given substantial weight in reflecting the value of the property used in the public service. The value of property used in the public service is, of course, of great importance in determining the reasonableness of rates. The property investment account of appellant, kept pursuant to the Commission's order, would not only make the investment account valueless but actually speak in terms of value which have no relation to the physical property itself.

(7) *Depreciation.*

A correct property account is necessary to the depreciation contemplated by Section 20, subsection 5 of the Act. Unless this account be kept to represent "Present fair value" of the depreciable property, the account will be worse than useless. See *United Railways v. West*, 280 U. S. 234, 254, it is impossible for appellant, pursuant to the Commission's order, "to make full, true and correct entries in such accounts, records or memoranda of the facts and transactions appertaining to the carrier's business," as is required by Section 20, subsection 7 of the Act.

There is no way of ascertaining what is the fair cash value of a property without considering the elements which make value.

REPRODUCTION VALUE.

The Commission's report (201 I. C. C. 645) at 670 states:

> "Clearly, the only pertinent value is that for purposes of sale or exchange. Cost of reproduction is to be given little, if any, weight in determining such value in the absence of evidence that a reasonably prudent man would purchase or undertake the construction of the properties at such a figure."

As we have pointed out, there were three witnesses who testified in this case that the property of Atlanta, Birmingham and Coast Railroad Company should be built now if it were not already in existence. This brings one to this thought:

The books which the Company is to keep under the order of the Commission in this case, may be looked upon as giving information for one purpose and one purpose only; that is the "fair cash value." That is a thing which changes from day to day. Under the plan of the Commission when one looks to the books for a rate hearing they would show nothing, though it is clearly contemplated by the law that they should be of value for such purpose. If you were to use the books as the basis for establishing credit they would be worse than useless and as stated by the witness Bell the first thing one would be required to do in such circumstances "would be to prove our books were not true." (R. 194). The books could not be used to show either the present value or the future value of the property. They would contain nothing to show what the property had cost to construct. In fact, they would be useless for every purpose for which books can be useful. It is not conceivable that the law requires books to be kept for one purpose but which can not be relied upon for two purposes or for any other purpose.

The books should be kept so as to aid and not prevent constitutional rights. The Atlanta, Birmingham and Coast Company has a constitutional right to a fair return on the value of its property used in the public service, in the manner and to the extent determined by frequent decisions of this Court, including *Willcox v. Consolidated Gas Company*, 212 U. S. 19, 20; *Smyth v. Ames*, 169 U. S. 466; *Southwestern Telephone Co. v. Public Service Commission*, 262 U. S. 286, 287, and Minnesota Rate Cases, 230 U. S. 352, 454.

The Commission by its order before the Court in this case has undertaken to deprive the carrier of the right to keep its accounts and records in such manner as will be necessary to prove the value of its property in controversies concerning rates, returns, credit and accounting matters. The carrier must swear to the correctness of its reports rendered to the Commission; and when it undertakes to prove another value for rates, etc., it will be presented with this value ordered by the Commission and sworn to by the Company.

An order of the Commission which brings about such results is necessarily arbitrary and it appears to us, to be equally unlawful.

PASSAIC CONSOLIDATED WATER CO. v.
BOARD OF PUBLIC UTILITY COMMISSIONERS
139 ATL. 324, 141 ATL. 921 (104 N. J. L. 666).

This case involved an order of the Public Utility Commissioners of New Jersey affecting the accounts of Passaic Consolidated Water Company. There was a consolidation of five companies had on October 26, 1923. On March 7, the Com-

mission had fixed the value of the property of those companies at $11,500,000 of which $300,000 was designated as working capital.

> "The Board in its approval of the consolidation directed that the books of the prosecutor should be opened on the basis of consolidated book costs, as shown in an exhibit referred to in said proceedings as Exhibit P-2. This exhibit fixed the valuation of the plant and working capital at the figures hereinbefore mentioned."

The Water Company opened its books on the basis of the consolidated book costs as of December 21, 1922, continued to the date of the merger, which was November 1, 1923. In its annual report for the year ending December 31, 1924, it used a different set of figures. In these figures the amount of fixed capital was of December 21, 1923, entered at $23,170,398, and after deducting depreciation reserve set up as a liability, it set up a net amount as fixed capital of $20,209,714. This was done as the result of an appraisement made by an expert in the valuation of public utilities. The Board objected to these figures and entered an order requiring that the books of account be conformed to the decision of the Commission of October 26, 1923, approving the consolidation, and to modify the charges made for depreciation, to rewrite its books of accounts and upon approval of the amended annual report the Water Company was not to set up other or different bases of fixed capital than that so approved. The court set aside this order of the Commission, holding:

> "Upon the regulation of a public utility corporation by a board of public utility commissioners, all the incidents of ownership, except in so far as it may be necessary to curtail them to properly exercise the power of regulation, remain with the corporation."

The court also held:

"The right to regulate a utility does not destroy the right of private ownership."

"All the incidents of ownership, except in so far as it may be necessary to curtail them to properly exercise the power of regulation, remain with the corporation. If the order of the board is arbitrary and unreasonable and beyond the powers given to it by the statute, it is void. It seems to us that one of the rights of private ownership is the keeping of accounts, not solely for the purpose of establishing a basis for fixing rates, but for such other matters as appertain to the ordinary business of a utility corporation. It owes to its stockholders certain rights that may require an entry upon its books of what it determines to be the fair value of the property. It must be recognized that when a board is fixing a basis for rates it may perchance mistakenly undervalue the property of the utility or eliminate from the valuation elements which in the past have required the expenditure of considerable funds.

"In ascertaining the income and excess profits upon which taxes have to be paid to the federal government, for example, it is fair that the full value of the property should be used. To use it requires that such a valuation shall be entered on the books of account. In the event of the sale of any of the company's property for which it has no longer use, there should be a record of the true value of such property. These illustrations might be multiplied. They are only used for the purpose of showing that in the conduct of the affairs of a corporation questions regarding its property will arise which require that there be entered upon its books other entries than that of the valuation fixed by the utility board for rate-making purposes."

We respectfully submit that this case is precisely in point and that its expressions are entirely in accord with the opinion of this court in *Kansas City Southern Railway case*, 231 U. S. 423, 449.

We further call attention to the case of *People ex rel. Iroquois Gas Corporation v. Public Service Commission of New York* (1934) 189 N. E. 764 (264 N. Y. 17). This case is very much the same as the Passaic Consolidated Water Company case.

THE COMMISSION'S CONSIDERATION OF THE EVIDENCE IN THIS CASE.

We do not contend that either the trial court or this Court should consider the evidence before the Commission anew; that is, that it should determine the conflicts of evidence. There are no conflicts of evidence in this case.

We do contend that the courts have the right to determine whether the Commission made proper application of the evidence before it; whether it applied correct principles in the weighing of the evidence; and as to whether or not there was any evidence to support the finding of the Commission. The same statute which gave appellant the right to a full hearing and conferred upon it the privilege of introducing testimony

> "at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless." *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 91.

Continuing to quote from that case:

> "And if the Government's contention is correct, it would mean that the Commission had a power possessed

by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence. . . . or, if the facts found do not, as a matter of law, support the order made." The court cites:

United States v. B. & O. S. W. R. R., 226 U. S. 14;

Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20;

Wisconsin, M. & P. R. R. Co. v. Jacobson, 179 U. S. 287; 301;

Oregon Railroad v. Fairchild, 224 U. S. 510; and

Muser v. Magone, 155 U. S. 240, 247.

It is held in *Interstate Commerce Commission v. Illinois Central Railroad Company*, 215 U. S. 452, at 470:

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have

been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

This Court has in other cases stated the relative fields of the Commission and of the Courts in a contest over an order of the Commission. We cite. *I. C. C. v. Union Pacific Railroad*, 222 U. S. 541, 547; and *Chicago Junction Case*, 264 U. S. 258.

See also *West v. Chesapeake & Potomac Telephone Company*, decided June 3, 1935, Law Ed. Vol. 79, page 948.

The Commission in this Case Erroneously Applied a Basis of Valuation Different from that Which It Would Have Applied in a Reorganization Case

At page 299 of the record the Commission's witness Boles testified:

"The practice in reorganization has been somewhat different from the practice in cases of acquisition by a new company of properties of an old company, where the security holders of the old company had no interest in the new company; that is, where the control of the new company passed to someone other than the security holders of the old company."

The witness continues and gives instances which come, in substance, to this:

That if an old company be reorganized, regardless of the manner of the reorganization, and the property is acquired by a new company and the new company is owned by substantially the same persons and in the same interests as the old company, then the valuation of the old company can be brought forward on the books of the new company.

In the case at bar, the bondholders of the Old Company (Atlanta, Birmingham & Atlantic Railway Company) became interested in the New Company (Atlanta, Birmingham and Coast Company) each on the same basis and to the extent that the bondholders of the Old Company received all of the preferred stock of the New Company. There was no provisions made in the plan of reorganization for the protection of the stockholders of the New Company. This has been treated as a basis for greatly decreasing the capitalization of the New Company. We submit that this was not a proper basis of depriving the New Company in this case of the benefits of the value of its property.

It would appear that the ownership of the securities should not affect the value of the properties for which those securities stand.

The ownership of the securities certainly should not affect either the market value or the fair cash value of the properties owned by the Atlanta, Birmingham and Coast Railroad Company.

The Commission offered no witness except Mr. Boles. The evidence given by him and above referred to was not contradicted.

This, if there were no more, would appear to us to make the decision of the Commission in this case as to the value of the property of Atlanta, Birmingham and Coast Railroad Company completely erroneous.

Upset Price of this Property at the Foreclosure Sale.

The Commission in its report refers to the fact that the upset price of this property at the foreclosure sale was $2,500,000 (R. 33). It also refers to the fact that there was only one bid for the property which was $4,500,000 (R. 34) and that the purchasers bought the property on behalf of the Reorganization Committee. As pointed out above, a railroad is rarely ever a subject of competitive bidding at a foreclosure sale. Such sales are wasteful and inefficient methods of readjusting the affairs of a railroad. This has been recognized not only by this Court but by Congress in its recent enactments for the reorganization of railroads.

In *Northern Pacific Railway Company v. Boyd*, 228 U. S. 482, 483 recognition of this fact was made and the court said:

> "The fact that property of great value belonging to an insolvent corporation is bid in by the reorganization

committee at the upset price fixed by the court at a judicial sale, cannot be used as evidence to disprove the recital as to its actual and far greater value when subsequently transferred by the reorganization committee to the new corporation."

Each basis upon which the Commission has undertaken to found its report falls with the slightest analysis.

THE FINDINGS OF THE COMMISSION ARE WITHOUT SUPPORT IN THE RECORD.

The basic intermediate findings of the Commission are not supported by the evidence and do not appear in the report of the Commission. The ultimate decision, that is, the final single sum value of the properties, $9,428,713.76, as of January 1, 1927, is not supported by essential intermediate findings and is arbitrary and capricious. Compare *Florida v. United States*, 282 U. S. 194, 215.

CONCLUSION.

The decree of the trial court dismissing appellant's bill and upholding the order of the Commission here involved is erroneous and should be reversed by this Court.

Respectfully submitted,

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